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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 233.

THE NEW YORK GUARANTY AND INDEMNITY COMPANY, PLAINTIFF IN ERROR,

vs.

THE BOARD OF LIQUIDATION OF THE STATE OF LOUISIANA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF LOUISIANA.

FILED AUGUST 21, 1879.

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a No. 6939. Supreme court of La. Filed Feb'y 4th, 1878.
(Signed) FRANK WALL,
D'y Clerk.

State of Louisiana, fifth district court, for the parish of Orleans.

THE NEW YORK GUARANTY AND INDEMNITY Company, appellant,
vs.
THE BOARD OF LIQUIDATION, ETC., APPELLEE. } No. 8317.

TRANSCRIPT OF APPEAL.

Edward Phillips, and Kennard, Howe & Prentiss, esq., for pl'ff & app't; attorney-general & assist. att'y-gen'l, for appellee.

Appeal returnable 1st Monday in February, 1878.

1 State of Louisiana, fifth district court, for the parish of Orleans.

NEW YORK GUARANTY AND INDEMNITY Company
vs.
THE BOARD OF LIQUIDATION, ETC. } No. 8317.

Petition.—Filed 17th May, 1877.

To the honorable W. H. Rogers, judge of the fifth district court, for the parish of Orleans:

The petition of the New York Guaranty and Indemnity Company, a corporation and body politic duly incorporated by and under the laws of the State of New York, domiciled in the city and State of New York, and of whose charter a copy is hereto annexed, marked A, respectfully represents—

That your petitioners are the bona-fide holders and owners of two hundred and fifty bonds issued by the State of Louisiana to the Mississippi and Mexican Gulf Ship Canal Company, under the pro-
2 visions of the act No. 116 of 1869, entitled "An act providing State aid in the construction of the Mississippi and Mexican Gulf Ship Canal, and for the issue of State bonds therefor," approved March 8, 1869, each of said bonds being for the sum of one thousand dollars, and having fifty-one coupons attached to each, of thirty-six $\frac{50}{100}$ dollars each, attached to each and every one of said bonds, payable on the first days of March and September of each year until the maturity of said bonds.

All of said bonds were duly signed by the governor of the State, and countersigned by the secretary of state, and sealed with the seal of the State, and were duly registered in the books of the treasurer of the State, and in all other respects were in exact conformity with the provisions of said act. And said bonds were made transferrable and negotiable by the endorsement of the president and treasurer of the board of directors of said company, as provided by said act.

3 That, by the terms of their charter, your petitioners were and are authorized to advance moneys upon any real or personal property on such terms as may be established by the directors of said

company, but no rate of interest exceeding seven per cent. is allowed to be charged.

That in the regular course of their legal and legitimate business, and for a full and valid consideration, your petitioners became the legal holders and owners of said two hundred and fifty bonds, and they are desirous of having them exchanged for the consolidated bonds of the State, in accordance with the act No. 3, approved January 4, 1874. That under the provisions of the act No. 11, approved May 17, 1875, the Board of Liquidation is prohibited from funding said bonds or exchanging them for the consolidated bonds of the State, under the provisions of the said act No. 11 of 1875, until said bonds "shall first, by final decree of the supreme court of the State of Louisiana, have
4 been declared legal and valid obligations against the State of Louisiana, and that the same were issued in strict conformity to law, and not in violation of the constitution of the State or of the United States, and for a valid consideration."

Now, your petitioner represents that the said bonds are legal and valid obligations against the State, and that the same were issued in strict conformity to law, and not in violation of the constitution of this State or of the United States, and for a valid consideration.

That said bonds have been repeatedly and constantly recognized as such by the executive, legislative, and judicial branches of the government, and appropriations have been regularly made for payment of the interest on the same; and said bonds have, for the benefit of the State, been declared a part of the debt of the State, in the case of State vs. Graham, No. 3358 of the docket of the supreme court.

5 Petitioners represent that they annex hereto a list of the numbers of each of said bonds, which is made part of this petition.

Wherefore your petitioners pray that the matter may be duly and legally investigated by the court, and that after due proceedings had according to law, that said bonds be decreed to have been issued in strict conformity to law and not in violation of the constitution of this State or of the United States, and that they be declared legal and valid obligations against the State of Louisiana, and issued for a valid consideration.

Further prays that said Board of Liquidation may be cited to defend this suit, and that the State of Louisiana be also cited and served with a copy hereof, through its attorney-general, that he may conduct this case to its final termination, as required by law.

Further pray for all such further general and special relief as justice, equity, and the nature of the case may require.

(Signed) EDWARD PHILLIPS.
(Signed) KENNARD, HOWE & PRENTISS,
Pl't'ff's Att'ys.

6 List of bonds of the State of Louisiana issued to the Mississippi & Mexican Gulf Ship Canal Company, and held by the New York Guaranty and Indemnity Company, described in the annexed petition.

Nos. one to fifty, both inclusive	50
Nos. 66 to 90, both inclusive	25
Nos. 111 to 120, both inclusive	10
Nos. 142 to 161, both inclusive	20
Nos. 166 to 175, both inclusive	10
Nos. 192 to 199, both inclusive	8

Nos. 200 to 230, both inclusive	31
Nos. 231 to 240, both inclusive	10
Nos. 241 to 267, both inclusive	27
Nos. 297 to 300, both inclusive	4
Nos. 306 to 321, both inclusive	16
Nos. 326 to 329, both inclusive	4
Nos. 362 to 395, both inclusive	34
No. 430	1
Total number of bonds	250

Exhibit A annexed. Printed copy of act of incorporation and by-laws of the New York Guaranty and Indemnity Co.

To go up in original.

Citation for the Board of Liquidation.

7 State of Louisiana, fifth district court, for the parish of Orleans, in the city of New Orleans.

THE NEW YORK GUARANTY & INDEMNITY CO. *vs.* THE BOARD OF LIQUIDATION, &C. } No. 8317

The Board of Liquidation, through Gov'r Francis T. Nicholls, ex officio president, New Orleans:

You are hereby summoned to comply with the demand contained in the petition of which a copy accompanies this citation, or deliver your answer to the same, in the office of the clerk of the fifth district court, for the parish of Orleans, within ten days after the service hereof.

Witness the honorable Walter H. Rogers, judge of the said court, this 18th day of May, in the year of our Lord 1877.

[SEAL.] (Signed) THOMAS DUFFY, *Clerk.*

Court-house opposite Jackson Square, corner Chartres street and St. Anthony's alley, upstairs.

Sheriff's return.

Received May 18th, 1877, and on the 21st day of same month & year I served a copy of the within citation and accompanying petition on Gov. F. T. Nicholls, ex officio president of the Board of Liquidation herein, in person; ret'd same day.

8 (Signed) J. A. FREMEAUX, *D'y Sh'ff.*

Citation for the attorney-general.

State of Louisiana, fifth district court, for the parish of Orleans, in the city of New Orleans.

THE NEW YORK GUARANTY AND INDEMNITY CO. *vs.* THE BOARD OF LIQUIDATION, ETC. } No. 8317.

Hon. H. N. Ogden, attorney-general of the State of Louisiana, New Orleans:

You are hereby summoned to comply with the demand contained in

the petition of which a copy accompanies this citation, or deliver your answer to the same in the office of the clerk of the fifth district court, for the parish of Orleans, within ten days after the service hereof.

Witness the honorable Walter H. Rogers, judge of the said court, this 18th day of May, in the year of our Lord 1877.

[SEAL.] (Signed) THOMAS DUFFY, *Clerk.*

Court-house opposite Jackson square, corner Chartres street and St. Anthony's alley, upstairs.

Sheriff's return.

Received May 18th, 1877, and on the 19th day of May, 1877,
9 I served a copy of within citation and accompanying petition on H. N. Ogden, att'y gen'l, State of La., in person. Returned same day. Sh'ff's fee, $1.50.

(Signed) M. DRISCOLL,
D'y Sh'ff.

Exception.—Filed May 29th, 1877.

In the fifth district court of New Orleans.

THE NEW YORK GUARANTY AND INDEMNITY CO.
vs.
THE BOARD OF LIQUIDATION. } No. 8317.

Now comes the defendant in the above-entitled case, and asks leave of the court to except to the petition of the plaintiff for vagueness.

Defendant alleges that act No. 116 of the legislature of 1869, p. 166, authorized the governor of the State to issue bonds under the following circumstances:

"When the said Mississippi and Mexican Gulf Ship Canal Company, beginning at the mouth of Bayou Duprés, on the shore of Lake Borgne, shall have completed the proposed canal for a distance of one mile to the depth of ten feet at ordinary stage of water, with a depth [*width?] of seventy feet at the top and fifty feet at the bottom, either by excavating on a new line or by widening, straightening, and deepen-
10 ing the channel of Bayou Duprés, then, upon the certificate of the State engineer, or of any one of the engineers of the board of public works selected by the governor of the State, that said work has been done as above provided, the governor of this State is hereby authorized and directed to issue the bonds of the State to the amount of one hundred and twenty thousand dollars, according to the provisions of this act."

By the terms of this act one hundred and twenty thousand dollars of bonds are to be issued for each mile as completed.

It is therefore important for the State to know for which mile or miles these bonds have been issued. The completion of the first two miles would not authorize the issuing of bonds for two miles that have not been completed.

Wherefore defendants pray that pl't'ff be compelled to allege for what part of said canal said bonds were issued, and that in default of thus amending his petition the suit be dismissed.

Defendants ask that this exception be sustained, and for all other necessary orders.

11 (Signed) J. C. EGAN,
Assistant Att'y-General.

*In pencil.

Amendments to petition.—Filed 30th May, 1877.

5th district court.

THE N. Y. GUARANTY & INDEMNITY CO.
vs.
THE BOARD OF LIQUIDATION. } No. 8317.

Defendants having filed an exception, the same is disposed of by the following allegations by plaintiffs:

The bonds up to No. 360 were issued with reference to the first three miles from Lake Borgne, in accordance with the statute.

The bonds from No 361 to 480, inclusive, were issued with reference to the fourth mile from Lake Borgne, in accordance with the statute.

The bonds held by plaintiff, as shown by the list of numbers on file, are included in above category.

(Signed) ED. PHILLIPS.
" KENNARD, HOWE & PRENTISS.

Order fixing exception for trial.—Minutes, June 4th 1877.

THE N. Y. GUARANTY & INDEMNITY CO.
vs.
THE BOARD OF LIQUIDATION, &C. } No. 8317.

12 On motion of Edward Phillips and Kennard, Howe & Prentiss, of counsel for plaintiff:

It is ordered by the court that the exception herein be fixed for trial on Tuesday the 5th inst., at 11 o'clock a. m.

Order (exception submitted.)—Minutes, 5th June, 1877.

THE N. Y. GUARANTY & INDEMNITY CO.
vs.
THE BOARD OF LIQUIDATION, &C. } No. 8317.

The exception herein came on this day for trial, and being submitted by counsel in open court, the same was taken under advisement.

Order overruling exception.—Minutes, 8th June, 1877.

THE N. Y. GUARANTY & INDEMNITY CO.
vs.
THE BOARD OF LIQUIDATION, &C. } No. 8317.

In the matter of the exception herein, for the reasons this day orally assigned in open court, it is ordered that said exception be overruled.

Answer.—Filed 11th June, 1877.

In the fifth district court, for the parish of Orleans.

NEW YORK GUARANTY & INDEMNITY CO.
vs.
THE BOARD OF LIQUIDATION, &C. }

13 Now comes the defendant, and for answer denies all and sin-

gular the allegations contained in plaintiff's petition. Wherefore defendant prays to be hence dismissed with costs, and for general relief.

(Signed) J. C. EGAN,
Assistant Attorney-General.

Order fixing cause for trial.—Minutes, 11th June, 1877.

THE N. Y. GUARANTY & INDEMNITY CO.
vs.
THE BOARD OF LIQUIDATION, &C. } No. 8317.

On motion of Edw. Phillips and Kennard, Howe Prentiss, of counsel for plaintiff:

It is ordered by the court that this cause be fixed for trial on Tuesday the 12th instant, at 5 o'clock p. m.

Order and continuance.—Minutes, 12th June, 1877.

THE N. Y. GUARANTY & INDEMNITY CO.
vs.
THE BOARD OF LIQUIDATION, &C. } No. 8317.

This case is continued.

Order (cause fixed for trial).—Minutes, 15th June, 1877.

14 THE N. Y. GUARANTY AND INDEMNITY CO.
vs.
THE BOARD OF LIQUIDATION, &C. } No. 8317.

On motion of Edw. Phillips, of counsel for plaintiff, it is ordered by the court that this cause be fixed for trial on Thursday the 21st inst., at 12 o'clock m., and that the attorney-general be notified hereof.

Notice of trial.

State of Louisiana fifth district court, for the parish of Orleans.

NEW ORLEANS, 15*th June*, 1877.

THE N. Y. GUARANTY & INDEMNITY CO.
vs.
THE BOARD OF LIQUIDATION, &C. } No. 8317.

To H. N. Ogden, attorney-general:

Sir: Please to take notice that the above-entitled case is fixed for trial on Thursday the 21st day of June, 1877, at 12 o'clock m.

[SEAL.] (Signed) THOMAS DUFFY, *Clerk.*

Sheriff's return.

Received June 15th, 1877, and on the 16th day of same month and year I served a copy of within notice of trial on H. N. Ogden, att'y-general, State of Louisiana, in person.

15 Returned same day.

(Signed) M. DRISCOLL, *D'y Sh'ff.*

Motion for a commission (pl'ff's).—Filed 21st June, 1877.

State of Louisiana fifth district court, for the parish of Orleans.

THURSDAY, *the 21st day of June*, 1877.

Present the honorable Walter H. Rogers, judge.

NEW YORK GUARANTY & INDEMNITY CO.
vs.
BOARD OF LIQUIDATION, ETC. } No. 8317.

On motion of E. Phillips & W. W. Howe, of counsel for plaintiffs, and suggesting that the testimony of Nathaniel B. Merrill and others, of the parish of St. Bernard, is necessary to plaintiff's case:

Ordered that a commission issue herein to E. A. Barosse, clerk of the district court, parish of St. Bernard, to take the said testimony.

Order & continuance.—Minutes, June 21st, 1877.

THE NEW YORK GUARANTY & INDEMNITY CO.
vs.
THE BOARD OF LIQUIDATION, &C. } No. 8317.

This cause is continued till Tuesday the 26th inst., at 12 o'clock m.

16 *Order & continuance.—Minutes, 26th June*, 1877.

THE N. Y. GUARANTY AND INDEMNITY CO.
vs.
THE BOARD OF LIQUIDATION, &C. } No. 8317.

This cause is continued.

Order fixing cause for trial.—Minutes, 9th November, 1877.

THE N. Y. GUARANTY AND INDEMNITY CO.
vs.
THE BOARD OF LIQUIDATION, &C. } No. 8317.

By consent of counsel, in open court, it is ordered by the court that this cause be fixed for trial on Tuesday the 20th instant, at 12 o'clock m.

Order & continuance.—Minutes, 20th November, 1877.

THE N. Y. GUARANTY AND INDEMNITY CO.
vs.
THE BOARD OF LIQUIDATION, &C. } No. 8317.

By consent of counsel, in open court it is ordered that this case be continued till Tuesday, December 1st, 1877, at 10 o'clock a. m.

17 *Notes of evidence & testimony taken in short-hand, in open court, on trial 1st Dec., 1877, & filed 13th December, 1877.*

Fifth district court, for the parish of Orleans.

Testimony and notes of evidence taken in the cause.

NEW YORK GUARANTY AND INDEMNITY CO.
vs.
THE BOARD OF LIQUIDATION. } No. 8317.

On Saturday, 1st December, 1877, before Hon. Walter H. Rogers, judge.

Appearances, E. Phillips, esq., and Messrs. Kennard, Howe & Prentiss, for plaintiffs; attorney-general & assistant attorney-general, for defendants.

NOTE.—Plaintiff offers in evidence act No. 116 of 1869.

Plaintiff also offers certified copies of the reports of the State engineer with respect to the work done upon the Mississippi & Mexican Gulf Ship Canal.

(The State objects to the reception of those documents as a matter of testimony to prove a consideration, but not for the purpose of showing that the bonds were issued in accordance with the statute.)

18 Plaintiff further offers in evidence a document marked "D," a requisition by the governor on the board of public works.

Also offers Document E, the detail of Gen. M. Jeff. Thompson, acting engineer of the board of public works, to make an examination of the work done on the canal.

Plaintiff also offers in evidence Document F, certificate of M. Jeff. Thompson, acting engineer of the board of public works, dated 23d April, 1869.

Also Document G, being the certificate of M. Jeff. Thompson, chief engineer of the State of Louisiana, dated 16th June, 1870.

Plaintiff also offers in evidence Document H, being the report of M. Jeff. Thompson, chief engineer State of Louisiana, with reference to the Mississippi and Mexican Gulf Ship Canal Company, dated 31st of December, 1870.

Plaintiff further offers in evidence a document marked "I," being the report made by the chief State engineer, M. Jeff. Thompson, dated 19th of June, 1872.

19 Plaintiff also offers in evidence Document J, report of board of State engineers to the general assembly, December 31st, 1872, with reference to the said Mississippi and Mexican Gulf Ship Canal, called the "Lake Borgne Canal."

Plaintiff further offers in evidence the two hundred & fifty bonds mentioned in the petition, with the endorsements by Cyrus Bussey, treasurer, and James O. Noyes, president of the Mississippi & Mexican Gulf Ship Canal Company, with the various coupons attached.

Counsel for plaintiffs also offer in evidence the plaintiff's charter, which is certified under act of Congress and the broad seal of the State of New York, marked "K".

Plaintiffs further offer in evidence the commission, testimony, &c., marked "L," and the documents annexed thereto, marked "M."

Plaintiff also offers in evidence the transcript in the case of the State of Louisiana, ex relation' Solomon & Simpson, against James Graham, auditor; the State of Louisiana, intervenor, No. 3358 of the docket of

the supreme court; and the report of the auditor referred
20 to in the statement in that case, which statement is marked "C."

(Counsel for defendant objects to the filing of this record on the ground that it is wholly irrelevant to the issue in this case.

On this the court rules that the objection goes to the effect and not to the admissibility of the record; to which ruling defendant reserves an exception.

It is agreed that in the event of an appeal in this case that the evidence just offered shall not be copied in the appeal, but reference shall be had to the transcript No. 3358, and the printed report shall be in lieu of copying in the transcript of appeal in this case.)

Plaintiff further offers in evidence the certificate of the State treasurer, marked "N," showing the registration of the (250) two hundred and fifty bonds sued on in this case.

Plaintiff also offers in evidence the certificate of the secretary of state with reference to the funding of the balance of this issue.

(Counsel for defendant objects to this document on the ground
21 that it is totally irrelevant.

Objection sustained by the court.

Counsel for plaintiff reserves a bill of exceptions.)

Plaintiff further offers in evidence a pamphlet containing the by-laws, acts, charters, &c., relating to the Mississippi and Mexican Gulf Ship Canal Company, marked "O."

Plaintiff also offers in evidence act No. 35 of 1870, page 81 of the acts of the legislature for that year.

Also offers act No. 72 of 1871, page 180 of the acts of 1871.

Also act No. 56 of 1873, page 111.

Also act of 12th of March, 1855, page 95 of the acts of that year.

NATHANIEL BRADFORD MERRILL, witness for defendant, sworn, &c.

Q. (By Mr. EGAN.) Captain, do you know this canal—the Mississippi and Mexican Gulf Ship Canal; do you know anything about it, and, if so, state it?

A. I do sir; I was employed there.

Q. (Witness being shown a map of the canal.) I believe that
22 this is the Mississippi & Mexican Gulf Ship Canal. State what connection you had with it.

A. I was superintendent of the canal company.

Q. From what time to what time?

A. From the 5th of April, 1869, until we left there in 1871.

Q. State what work was done by this company, commencing at the first mile.

(Objected to by counsel for plaintiffs.

NOTE.—Before passing on the foregoing objection the witness Merrill was withdrawn pro tem.)

CYRUS BUSSEY, sworn, &c., for plaintiffs.

Q. General, you were treasurer of the Mississippi & Mexican Gulf Ship Canal Company at one time, were you not?

A. I was, sir.

Q. Do you remember from what time to what time?

A. I can't remember the dates exactly, but some time after the bonds were issued it was that I was made treasurer of the company.

(NOTE.—Question objected to by counsel for defendant on the ground that under the statute bonds were only to be issued as each mile

23 was completed, and a valid consideration for the bonds is required under the statute.

Objection overruled, and exception reserved by counsel for defendant.

NOTE.—Counsel objects on a further ground that this question is wholly irrelevant.

Objection overruled by the court.)

Q. There were two issues of bonds in this case: one on three miles of the canal, issued in June, 1869, and one on the fourth mile, issued in June, 1870?

A. Yes, sir; and I was made treasurer before the issue for the fourth mile.

Q. Didn't you continue to be treasurer afterwards?

A. Yes, sir; I did.

Q. Do you know the plaintiffs in this case, the New York Guaranty and Indemity Co.?

A. Yes, sir; I do.

Q. The bonds sued on in this case bear the endorsement of J. O. Noyes as president of the company and of yourself as treasurer; are these endorsements genuine—are they the signatures of yourself and Mr. Noyes?

24 A. Yes, sir; they are.

Q. The company made a loan, it appears, in 1871; the plaintiff made a loan on these bonds for about two hundred thousand dollars ($200,000)?

A. Yes, sir; two hundred thousand dollars was borrowed on them.

Q. What disposition was made of that money?

A. Every dollar of it was spent on the construction and the work on the canal; spent for constructing it.

(NOTE.—Question objected to by counsel for defendant, unless the witness in his statement be restricted to testifying as to whether or not the money was expended on the mile or part of the canal of which counsel are now inquiring.

Objection overruled.)

Cross-examination:

Q. Gen'l Bussey, how much money was expended of this money for the first mile of the canal, how much upon the second mile, how much on the third, and how much upon the fourth mile?

(NOTE.—Counsel for plaintiff objects to this question.

Objection overruled by the court.)

25 A. It is impossible for me to answer this question; I only know that all the money that the company came in possession of, together with a large amount from individuals, consumed in the construction of the canal. I wasn't treasurer of the company at the time that the first three miles was constructed and the bonds issued, but I was at the time the fourth mile was completed and the bonds issued.

Q. Was there any money obtained from the sale of the bonds until the bonds were issued for the first three miles?

A. Obtained on the bonds?

Q. Weren't the bonds for the first three miles issued and put in the market for the same time?

A. I believe they were.

Q. You say that you don't—you don't know the amount of money that was spent on the 1st, 2nd, 3rd, or 4th mile of the canal?

A. No, sir; I don't.

Q. (By the COURT.) How many miles were the canal to be dug altogether?

A. Seven miles altogether, inclusive of the lock of the canal
26 at the river; seven miles altogether.

Q. Do you know how much work was done on the first mile of that canal?

A. No, sir; I have no idea how much. I only know that I went down there on an excursion with some other gentlemen and saw a dredge-boat working there, before the first bonds were issued.

Q. Whereabouts did you go?

A. Not far from the lake.

Q. You don't whether it was the first mile or the second mile?

A. I should think it was within a mile of the lake. I rode down in a skiff.

Q. What capital had this co. before the bonds were issued?

A. I can't tell you anything about that.

Q. Did it have any capital?

(NOTE.—Question objected to by counsel for plaintiff as irrelevant. Objection overruled by the court.)

A. Capital stock of the company was fixed at two millions of dollars.

Q. (By the COURT.) I ask you was that capital subscribed and paid up, or any part of it?

27 A. I don't know how much money was raised.

Q. (By the COURT.) Tell us how much private capital was expended on the first four miles.

A. I couldn't tell you how much capital was expended on the first four miles.

Q. Do you know how much private capital was expended altogether?

A. On the whole of it?

Q. Yes.

A. Well, more than a hundred thousand dollars, as well as the money that was received from the State, was expended on the canal.

(NOTE.—Objected to by counsel for defendant as irrelevant. Objection overruled by the court. Exception reserved by counsel for defendant.)

Q. You were a director of the company from its first commencement?

Ans. I believe I was.

Q. You stated that you knew that work was done on the first three miles before you became treasurer of the company, and prior to the issue of the bonds?

A. Yes, sir; I saw that when I went down as a visitor to the canal.

28 Q. You knew Mr. Noyes?

Ans. Yes, sir.

Q. You know that at that time he either owned or he controlled a dredge-boat?

A. Yes, sir.

Q. Do you know where he had it before he began to work on this canal?

A. I only know from hearsay that it was at Pascagoula.

(Counsel for defendant objects to any hearsay testimony.)

Q. Didn't you know it as a fact that he was excavating bars across the lake at Pascagoula?

(Objected to by counsel for defendant. Objection overruled by the court.)

A. I saw a dredge-boat at work on the canal, and I think I can say that I know it belonged to Dr. Noyes.

Q. You happen to know that there was a large amount of money expended on the (3) three first miles—upon the construction of the (3) three first miles of this canal?

A. Yes, sir; I know that considerable sums were spent upon it, but I don't know how much.

Q. Can you tell the court the general character of the work
29 which was required on the first (3) three miles to make this canal conform to the requirements of the statute?

A. I know that there was a number of places where the bayou had to be deepened and widened, and trees and underbrush cut off in order to make the canal navigable.

Q. And points to be cut off also?

A. Yes, sir.

Q. Do you remember whether or not obstructions that had been placed there during the war had to be removed?

A. I don't remember that.

Q. State to the court what was the cause of the eventual failure of this canal as a highway of navigation and business. How long have you been a business man?

A. Since I was (16) sixteen years old. Thirty years ago, I should think.

Q. Well, it was expected when you took hold of this canal that it would be a great highway of commerce between Mobile and ports of the lake and New Orleans.

30 A. I would like to state the history of this canal and my connection with, as my reputation is somewhat involved in it. I and several other gentlemen, whom I regarded as responsible and honorable, entered into this company for the purpose of adding to the commercial importance of New Orleans by making an outlet, a permanent outlet, between the Mississippi River and the lake. We considered that this would afford the means of communication for shipments of produce from the upper Mississippi River and the various ports on the lake and Mobile; also for the transportation of lumber to New Orleans. I went into it without any hope of reward other than the general benefits that I expected would result to the community.

Q. State what caused the enterprise to fail.

A. The canal company met with great difficulties in the excavation of the canal in the upper end towards the river. All the work was prolonged beyond the time of our estimates. Sunken roots and
31 stumps would delay the dredge-boats for days at a time by causing breakages of machinery. The lock-pit was an enormous work, requiring the excavation of a large amount of earth, and in consequence of this great delay the company was carried into a time when the credit of the State was impaired by the frequent revolutions that had taken place in political matters, till the loans which the company had effected on its bonds were so much greater than their market value. At one time those bonds were down, I think, as low as (25) twenty-five cents on the dollar. The company was called upon to make good the margins, which was an impossible thing for it to do, so the bonds were sold to pay the loans that had been contracted. By this time the Mobile and New Orleans Railroad was constructed, and that, to a great extent, took the place which this canal was intended to fill, and it prevented private capitalists putting up money to complete it, as more than (½) half

32 the capital put up by the State had been consumed, owing to the decline in the value of the bonds.

Q. (By the COURT.) Didn't Van Norden have something to do with breaking it down?

A. Yes, sir.

Cross-examination:

Q. The company took hold of the drainage of the city, then?

A. Yes, sir.

Q. And they made another failure on the drainage, didn't they?

A. Yes, sir; for the same cause; the compensation didn't pay the current expenses of the work.

Q. Were not the dredge-boats of that company purchased with money resulting from the sale of the bonds?

Ans. Yes, sir; partly.

Q. Were not the dredge-boats bought for the canal brought up here and used in the drainage of the city?

A. Yes, sir.

Q. Suppose that company had started into work with a large capital, and had not depended upon starting through the State, don't you

33 thing that they would have been successful in that canal; it would not have taken (600,000) six hundred thousand dollars to cut a canal through a natural bayou, would it?

A. More than five hundred thousand dollars were spent on that canal, without the machinery.

Q. (By counsel for plaintiff.) And for the machinery how much?

A. About a hundred thousand dollars.

Q. (By counsel for plaintiff.) And the "lock" was still to build?

A. Yes, sir; the "lock-pit" was cut and the plans and a large part of the machinery were made by the engineer, and the lock would have been completed in a short time.

Q. Didn't the company rely upon the State to build that canal?

A. No, sir; that is not true. The first expectation was to build it out of the stock of the company, and it was found that the work would cost a great deal, and private capital could not be found to undertake it. It was believed that if State aid could be had, which then

34 was regarded as a loan, to complete a part of the canal, that private capital would be found to do the balance.

Q. It was understood that the work would be done with the State's money?

A. Yes, sir.

Q. That was the theory upon which the bonds were obtained.

A. I can't tell you, as I had nothing to do with the procuring of the legislation and had nothing to do with the company till after the completion of the first three miles, and then I took hold of the company to insure the faithful payment of the monies, and nothing else in the world.

Q. (By counsel for plaintiff.) You know that a large amount of work was done on the (4th) fourth mile before the bonds were issued at all?

A. Yes, sir; that I know.

Q. You were speaking of the reasons for the commercial failure of this work; those causes would have affected the canal even if it had been entirely completed?

A. Yes, sir; it would.

35 Q. The canal was completed up to the river, so that vessels of considerable size could come up close to the river?

A. Yes, sir; I saw vessels within a quarter of a mile of the river.

Q. And the canal was advertised as open to trade, *wouldn't* it?
A. Yes, sir.
Q. And there was trade on it?
Ans. Yes, sir.
Q. So there was really a canal from the lake to the river?
A. Yes, sir.
Q. You have been through it several times?
A. Yes, sir.
Q. And there is a canal there now?
A. Yes, sir.
Q. Was not one cause of depression to this canal when the railroad was built from Mobile here, and Morgan's steamers were removed from the trade between here and Mobile?
A. Yes, sir; it was.
Q. They were expected to use this caual?
A. Yes, sir; it was expected that the whole of Morgan's line would come through this canal.

36 (Counsel for plaintiff objects to this question. Objection overruled.)

NATHANIEL B. MERRILL recalled for defendant.

Q. State if you were engaged on this canal from the beginning of the work.
A. I was, sir.
Q. State what work was done on the first mile of the canal.
(Objected to by counsel for plaintiff. Objection overruled by the court. Counsel for plaintiff reserves a bill of exceptions.)
Q. Go on and state what amount of work was done; what was the value of the work that was done upon the first mile of that canal?
A. I should judge about a thousand ($1,000.00) dollars.
Q. It would amount to about a thousand ($1,000.00) dollars?
A. Yes, sir.
Q. What was that work?
A. Dredging off a point from one place about a mile from the mouth of the bayou, at the lake end of the bayou.

Q. How wide was that canal and how deep was the dredging?
37 How wide was it at the top and at the bottom, and how deep was it?

A. In width it was from (90) ninety to (100) one hundred feet. It was only the natural depth.
Q. But where you dredged how deep was it?
A. They only dredged off a point to shorten the canal.
Q. They cut off one point?
A. Yes, sir; to straighten the canal.
Q. Was that all the work that was done on the first mile?
A. Yes, sir.
Q. How long did it take to perform that work?
A. Seven days, sir.
Q. How many hands were engaged in doing that work?
A. Five hands on the dredge-boat.
Q. What was the depth and width of that first mile; was it seventy (70) feet wide on top and wide on the bottom?
A. Yes, sir; it was all that, and the natural depth of the bayou about ten (10) feet.

Q. You say the amount of the labor done on that part of the
38 canal was only seven (7) days' work, and didn't exceed in value a thousand dollars?

A. Yes, sir.
Q. Now, what work was done on the second (2d) mile?
A. On the second (2d) mile, I employed a gang of negroes, some fifteen or twenty, in cutting off the overhanging branches of the trees along the bayou, and the dredge was used in taking stumps from the bayou and placing them on the bank; in fact, in clearing the second mile.
Q. How much was the value of the work done on the second mile?
A. I should judge twelve hundred ($1,200) dollars.
Q. Is that all on the second mile?
A. Yes, sir; that's all that was done.
Q. How long did it take to do that work?
A. It took (10) ten days.
Q. And how many hands?
A. From (25) twenty-five to (30) thirty hands.
Q. That was all that was done in the second mile?
39 A. Yes, sir; all that was done in the second mile.
Q. Was there any work done afterwards?
A. Yes, sir.
Q. But this was prior to the issue of the bonds?
A. Yes, sir.
Q. What was the depth of the work on that second mile?
A. Seventeen or eighteen feet in some places, and ten feet deep all the way along; that was the natural depth.
Q. What was the third mile—how much was done on that?
A. Well, on the third mile we commenced about two hundred feet below where the three miles terminated. We commenced to dredge there through a lagoon, until we commenced on the fourth mile, and done about two hundred feet of dredging.
Q. How wide at the top and how deep did you cut that section of the canal?
A. We cut it seventy (70) feet in width and ten (10) feet in depth.
Q. How wide was it cut at the bottom?
A. Forty (40) feet wide at the bottom.
Q. Well, that worth, that work—how long did it take to do it?
40 A. Well, it is worth about two thousand (2,000) dollars.
Q. How many hands were engaged on it?
A. Only the dredge-boat hands—five (5).
Q. How long were they employed on that?
A. Two weeks—fourteen (14) days.
Q. That was all the work that was done on the third mile?
Ans. Yes, sir.
Q. Now, in that third mile was that natural bayou ten (10) feet deep all the way?
A. Not the third (3d) mile.
Q. How much of that third (3d) mile did not have ten (10) feet in depth?
A. About one hundred & fifty (150) feet.
Q. When this certificate was given to the engineer?
Ans. Yes, sir.
Q. Do you know the date the bonds were issued in this case?
A. Yes, sir; they were issued on the 23d of April.
Q. Now, on that date were there ten (10) feet of water in the bayou all the way along—all the way through?
A. No, sir; there was not.
41 (NOTE.—Counsel for plaintiff objects to this testimony. Ob-

jection overruled by the court. Counsel reserves a bill of exception.)

Q. Now the fourth mile—tell us about that.

A. There was a good deal of money expended on the fourth mile.

Q. How much was expended?

A. I suppose from fifty (50) to seventy-five (75) thousand dollars, because the mud was so soft that we couldn't place it far enough by one dredging, and we had to pass over it twice.

Q. How wide was the fourth mile, and how deep at the top and the bottom?

A. It was a lagoon, and it was some two hundred (200) feet wide. It was seventy (70) feet at the top, and under (40) forty feet at the bottom.

Q. How deep was it? Was it ten feet deep all the way?

A. No, sir.

Q. Was there full ten (10) feet of water at the point where the lake & bayou come together?

A. No, sir; there is a bar just there at the mouth of the bayou.

42 Q. What's the depth of water on the bar?

A. When I came in with a dredge-boat there was three feet at low water.

Q. State to the court the condition of the lake as to depth of water around the canal. Was it ten feet at the time that the bonds were issued?

A. No, sir.

Q. Could a boat drawing ten (10) feet of water come in from the lake to the bayou?

A. No, sir; she couldn't do any such thing.

Q. You spoke of having to double dredge it—to dredge twice on that l'goon—was the condition of things such at that point that it would loose its depth of ten (10) feet necessarily when you stopped dredging?

A. Yes, sir; the earth that was excavated in the lagoon should have been taken away and dumped somewhere else out of the lagoon. The ground was so soft that as we dug through there the soft mud filled up the behing us.

Q. Would that soft mud fill in?

43 A. It would continue to do so unless it was piled away in some other place as it was dug.

Q. Although you cut to a depth of ten (10) feet, you didn't get a depth of ten (10) feet that could be relied upon?

A. No, sir; that cut was ten (10) feet in dredging, but it filled up a month after.

Q. I understand you to say that you didn't cut ten (10) feet deep?

A. We cut ten (10) feet, but as we got through dredging the earth would sink in the rear of the boat and fill up.

Cross-examination:

Q. You spoke of the value of the work; do I understand you to say that the work could be done for the amount that you say, including the cost of the boat and the machinery at the price that you mentioned? I merely ask you if you took into consideration the costs of the boat and machinery preparatory to the work, or what the work costs from day to day.

A. I count what the work costs from day to day.

44 Q. Weren't there a number of boats engaged in that work?

Ans. Yes, sir.

Q. Weren't these boats valuable?

Ans. Yes, sir.

Q. Have you any idea of their value?

A. Yes; the boats cost, with machinery incomplete, twenty (20) thousand dollars apiece for four (4) of them; and one of them cost (12) twelve thousand dollars.

Q. When you dug with these boats you dug more than ten (10) feet deep as a rule, didn't you?

A. We dug sometimes (12) twelve feet deep.

Q. You did your best in good faith to make a good channel there?

Ans. Yes, sir.

Q. In this lagoon, of course, the mud was so soft that it interfered with your work?

A. Yes, sir.

Q. It was almost the consistency of pudding?

A. No, sir; after dredging to the depth of (8) eight feet we came to a harder bottom—more clayey and stiffer than at first.

45 Q. You also had a device on the banks to remove the dirt?

A. Yes, sir, we had; but that was a year after.

Q. You were speaking of a bar; I suppose that was outside the canal?

A. The attorney-general questioned me on the (3d) third mile, and there there was a bar of one hundred and fifty (150) feet with only (8) eight feet of water on it.

Q. But at the mouth at the lake?

A. Yes, there was; just at the entrance.

Q. But in all navigable stream' that enter into salt water there is is generally a bar at the mouth?

A. Yes, sir.

Q. How far is that generally found outside?

A. This one commences outside about (400) four hundred feet, and there isn't more than six to seven feet in the lake.

By counsel for defendant:

Q. Did that bar come close up to the mouth of the canal?

A. Yes, sir; right up to the land on each side, and then it formed a crest.

46 Q. (By counsel for def'd't.) The crest is outside, isn't it?

A. Yes, sir.

By counsel for plaintiff:

Q. The plan was to remove that bar after the canal was completed?

Ans. That was the plan, sir.

Q. There was no use to let vessels in that canal until it was completed; and, therefore, it was unnecessary to deepen the mouth?

A. Yes, sir; it was intended then to let only our dredge-boats in and out.

Q. Some of the dredge-boats were constructed on the canal, on the riverside, weren't they?

A. No, sir; at Pascagoula.

Q. Is there not a canal from the lake up to the river now?

A. Not exactly; but there is a canal up to within a (quarter in pencil. of a) mile of the Mississippi River.

Q. What's the distance from the lake to the river?

A. Seven (7) miles.

Q. Isn't there a canal dug in a straight line of (4) four miles in length?

47 A. No, sir; we use the bayou to within (4) four miles of the river.

Q. And within that distance is not there a purely artificial canal four (4) miles long, cut right through the earth?

Ans. Yes, sir.

Q. There is a lock-pit dug there?

Ans. Yes, sir.

Q. It is a pretty large excavation made?

Ans. Yes, sir.

Q. It was dug with a view of putting a lock-pit there?

A. Yes, sir.

Q. Are there not boats running up and down that canal?

A. Yes, sir; small light-draft boats of four to five feet draft, but no more.

Q. There has been no work done on that canal since 1871 I believe it was; there has been no work done on that canal since the company stopped working on it?

A. No, sir.

Q. (By the attorney-general.) How deep is that canal within (3) three miles of the river?

A. It is from (7) seven to (9) nine feet deep.

48 Q. Are these (3) three miles that are dug out where the natural chan'el is not used? State to the court what in your opinion was the cost by the excavation of those three (3) miles of the canal.

A. Well, one hundred and fifty thousand ($150,000) dollars.

Q. Would that cover the actual work done?

A. Yes, sir.

Q. Do you know where the dredge-boats and other machinery used for excavating that canal are now?

A. Well, I can't say for a fact where they are, but they are here in the city; in some of the city canals.

Q. How many dredge-boats were there on that canal?

A. There were (4) four—yes, six (6) altogether; four (4) that cost $20,000 each; one that cost $12,000, and one that cost $25,000.

Q. And you think that the whole of the (3) three miles was excavated at a cost of $150,000?

A. Yes, sir.

By counsel for plaintiff:

49 Q. There has been a large amount of work done on that canal?

A. Yes, sir.

Q. Do you know anything about the old canal on the Bayou St. John including the canal Carondelet?

Ans. Yes, sir.

Q. Do you know whether there has been more work done on this Mexican Gulf Canal than on the old canal?

Ans. I can't answer that question.

WILLIAM H. GILLESPIE sworn and examined for defendant.

Q. Mr. Gillespie, were you connected in any way with the work on the Mexican Gulf and Ship Canal at any time?

Ans. Yes, sir.

Q. When did your connection with it commence?

A. With the commencement of the work on the canal, at the same time as Capt. Merrill; yes, sir.

Q. State what work was done on the first mile of the canal by that company. Do you recollect what work was done on the first
50 mile—or perhaps you had better state first what was your position in the employ of that company; did you hear the testimony of Captain Merrill?

A. Yes, sir; I heard it.

Q. Did you listen to it attentively?

A. Yes, sir.

Q. Do you corroborate it?

A. Yes, sir; so far as the work goes, so far as the three (3) miles went; but I don't know the valuation of the work. I was only connected with the first three (3) miles of the work. The boat that I was on was ordered to Pascagoula after three miles had been done, and I there severed my connection with the company. I left them there.

Q. And so you don't know the price of such work?

A. No, sir; I don't know the price.

Q. You were on this boat in what capacity?

A. I was employed as "dipper tender."

Q. The work that was done on the second mile was what?

A. To dredge off a point.

Q. Was not the natural bayou around there, in the neighbor-
51 hood of that point, as good before as it was after your dredging?

A. Just as good, sir; but that point was cut off to straighten the canal and make it shorter.

Q. How much did you take off that point?

A. We took of' about thirty (30) feet; what we dug off the point we swung around and threw it in the canal.

Q. You were there all the time?

A. Yes, sir; all the time while the work was going on on (3) three miles of the canal.

Q. And that was all the work that was done on that part of the canal; what you described?

A. Yes, sir.

Q. How many dredges did you have at work on the canal?

Ans. Only one, sir.

Q. And that dredge didn't belong to the company?

A. I understood that it belonged to Mr. J. O. Noyes; he had been doing some work at Pascagoula with it before we came to the canal.

Q. What could that dredge have been hired for by the day?

A. I should say about (15) fifteen dollars a day.

52 Q. How long did it take you to cut off that point?

A. As near as my memory serves me now, it took us about a week.

Q. And you think that fifteen (15) dollars a day would be reasonable pay for the use of a dredge-boat?

Ans. Yes, sir.

Q. (By counsel for plaintiff.) The dredge, you say, belonged to Mr. Noyes?

A. Yes, sir. I was working under Capt'n Merrill as superintendant of the work at Pascagoula, and we left Pascagoula before the cutting there was done, and come here to the canal.

Q. How many dredges came through the canal?

A. Only one dredge came through the canal to Bayou Dupré, when I came on here.

Q. (By counsel for defendant.) Was there more than one dredge used on the first mile of the canal?

A. The dredge that I was on was the only dredge-boat that was used on the first three (3) miles of the canal, that I know of. I only worked four months on the canal, and then returned to Pascagoula.

53 Q. And all the work was done on that distance while you were there, by the boat you were on?

A. Yes, sir; and those additional dredge-boats were constructed afterwards at Pascagoula, and sent over here. The first (3) three miles was claimed to have been finished when we left Bayou Dupré, and went back to Pascagoula. On returning to Pascagoula I severed my connection with the company.

Q. Only one dredge-boat was used on the first (3) miles?

A. Yes, sir; that's all.

N. B. MERRILL (recalled by counsel for defendant).

Q. How many dredge-boats, Capt'n, were used on the first (3) three miles of the canal?

A. There was only one.

Q. What would have been a fair compensation per day for the services of such a boat?

A. Fifteen dollars a day.

Cross-examined by Judge HOWE, counsel for plaintiff:

54 Q. Were there any other dredge-boats here for hire at that time?

Ans. No, sir; not at any time.

Q. Then it wouldn't have been practicable to have gotten any dredge-boats at that time, unless by building them?

Ans. No, sir.

Q. Please state as succinctly and clearly as you possibly can the condition of the canal at the time that the company ceased to work on it in the year of say, 1872.

A. They done some work after I left it, then the drainage company, before I left, took (4) four dredges to come up and do the city drainage and they left (2) two dredges there.

Q. At the time that they ceased work, what was the condition of the canal as a work of navigation—for instance, commencing near the river, there was a lock-pit excavated?

A. Yes, sir.

Q. How many feet long was it?

A. The lock-pit was (200) two hundred feet long by (150) one hundred and fifty feet wide.

Q. And how deep was it?

55 A. It was (12) twelve feet deep.

Q. Proceeding from that point there was an artificial canal dug—for about how far—what distance?

A. For (3) three miles.

Q. It was cut in a nearly straight line?

A. Yes, sir.

Q. Then you came to the bayou, and from that point the bayou was improved to the lake?

A. The fourth mile was improved. The bayou from the point of the (4th) fourth mile to the (3d) third mile towards the lake was improved.

Q. From that point to (3) three miles towards the lake the work had been done, which you have already described, whatever it was, and also some further work outside the mouth of the bayou in driving piles?

Ans. Yes, sir.

Q. How far out were the piles driven into the lake?
A. They were driven (400) four hundred feet out.
Q. That was done with a view of forming an entrance, I suppose?
Ans. Yes, sir.
Q. And for protecting the entrance?
56 A. Yes, sir.
Q. Had anything been done in the way of dredging outside in the lake to remove this bar?
A. Yes, sir; one cut of (20) twenty feet wide had been dug out.
Q. How deep was it?
A. It was (8) eight feet deep.
Q. What was the average depth for navigable purposes in Lake Borgne?
A. The prevailing winds change the depth. It is six to nine feet in depth in the summer-time.
Q. If those locks were completed the canal would now be useful for certain purposes?
A. For small draft vessels it would be, but it is of no use for vessels of more than (4) four feet draft.
Q. The fourth (4th) mile is filled up some since 1872?
A. Yes, sir.
Q. You say the water is lower in the winter than in the summer?
A. Yes, sir; owing to the prevailing winds from the north.
Q. (By counsel for defendant.) I would like to ask you whether,
57 scientifically, it was impracticable for boats of ten (10) feet to navigate this canal without dredging the lake?
A. That's my opinion, without dredging the lake.

NOTE.—Plaintiff offers in evidence the testimony of M. Jeff. Thompson included in the transcript 6324 of the supre. court.
(Objection by counsel for def'd't. Objection overruled, and exception reserved.)

NOTE.—It is admitted that M. Jeff. Thompson is dead; and it is agreed, in case of appeal, that either party may use the record 6324 so far as his testimony is concerned.

NOTE.—Plaintiff offers in evidence the testimony of Mr. Adley to be found in the record 6324.
Continued.

Act No. 16 of 1869.

Offered in evidence by pl'ff 1st December, 1877. Not copied. To be read in printed statute.

Certified copies of the reports of the State engineer, with
58 respect to the work done upon the Mississippi & Mexican Gulf Ship Canal (being documents marked from letter D to J inclusive), offered in evidence by pl'ff & filed 1st Dec'r, 1877. Copies of reports & estimates on the Mississippi & Mexican Gulf Canal, from the office of board of State engineers, October, 1875.

Document D.—Requisition of Gov. Warmouth on pres't board of pub. works.

D. Copy.

"STATE OF LOUISIANA,
"EXECUTIVE DEPARTMENT,
"*New Orleans, April 19th*, 1869.

"Gen. MARTIN FLOOD,
"*President Board Public Works:*

"SIR: I have the honor to request you to report to me for the purpose of making a survey of the work done on the Mexican Gulf Canal in accordance with the provisions of act 116 of the legislature of 1869. Approved March 8th, 1869.

(Signed) "H. C. WARMOUTH,
"*Governor of Louisiana.*"

OCTOBER 21ST, 1875.—I certify that the above is a true copy of the original on file in this office.

59 (Signed) K. BOL. THOMPSON,
Sect. Board of State Engineers.

Document E.—Detail of Gen'l M. Jeff. Thompson, engineer of board pub. works, to make an examination of work done.

E. Copy. April 20th, 1869.

Gen'l M. JEFF. THOMPSON,
Engineer Board of Public Works:

SIR: You will without delay report to Hon. H. C. Warmoth, gov. of La., for the purpose of making an examination and survey on work on the Mexican Gulf Canal, in accordance with provisions of act ℅ 116 of the legislature of 1869. Approved March 8th, 1869.

Very respectfully,
(Signed) R. D. MITCHELL,
Secretary.

OCTOBER 21ST, 1875.

I certify that the above is a true copy from the letter-book in this office.

(Signed) K. BOL. THOMPSON,
Sect. Board of State Engineers.

Document F.—Certificate of Gen. M. Jeff. Thompson, dated 23d April, 1869.

60 F. Copy.

STATE OF LOUISIANA,
ENGINEER'S OFFICE, BOARD OF PUBLIC WORKS,
New Orleans, La., April 23d, 1869.

To his excellency H. C. WARMOTH,
Governor of Louisiana, New Orleans:

GOVERNOR: In pursuance of your order, directing me to survey and examine the condition of the Mississippi and Mexican Gulf Canal, in

conformity with act 116 of the legislature of Louisiana, approved March 8th, 1869, I have the honor to report and certify that I have personally visited and inspected the Bayou Duprés, and the work done and being done by the Mississippi & Mexican Gulf Canal Company, and that I found in Bayou Dupres, from Lake Borgne, and in the direction of the Mississippi River, more than "three consequitive miles of channel with a width of more than seventy feet on the surface, more than forty feet on the bottom, and with more than ten feet in depth," in fact with sufficient capacity to accommodate any vessel now plying on the waters of Lake Borgne or Lake Pontchartrain, and the company still at work
61 with machinery and manual labor straightening and widening the bayou, and I hereby certify that the Mississippi & Mexican Gulf Canal Company are now entitled to such issue of bonds as said act No. 116 authorizes for three consequitive miles of the dimensions specified from Lake Borgne towards the Mississippi River.

I have the honor to be, most respectfully, your obedient servant,

(Signed) M. JEFF. THOMPSON,
Acting Chief Engineer Board of Public Works.

OCT. 21st, 1875.—I certify that the above is a true copy of the record on file in this office.

(Signed) K. BOL. THOMPSON,
Sect. Board State Engineer.

Document G.—Certificate of Gen. M. Jeff. Thompson, ch'f eng'r of State, dated June 16, '70.

"G." Copy.

OFFICE BOARD OF PUBLIC WORKS,
CHIEF ENGINEER'S OFFICE,
New Orleans, La., June 16th, 1870.

To his excellency H. C. WARMOUTH,
Governor of Louisiana:

GOVERNOR: In compliance with your instructions I have examined and measured the work done by the Mississippi and Mexican
62 Gulf Canal Company on their canal since my report to your excellency on April 23d, 1869; and I hereby certify that they have completed their canal to a point four miles from the martello tower, on Lake Borgne, and that the same is done in accordance with the specification enumerated in act No. 116, approved March 8th, 1869. Therefore said company are now entitled to the issue of State bonds for the fourth mile, as provided in said act, in addition to the three miles embraced in my report of April 23d, 1869. Permit me to add that their preparations for work exceed anything of the kind ever seen in this State, and that we may anticipate an early completion of this important work.

I have the honor to be your obedient servant,

(Signed) M. JEFF. THOMPSON,
Chief Engineer.

OCTOBER 21ST, 1875.—I certify that the above is a true copy of the record on file in this office.

(Signed) K. BOL. THOMPSON,
Sect. Board of State Engineers.

63 *Document H.—Report of M. Jeff. Thompson, ch'f eng'r, dated 31st Dec., 1870.*

H. Extract.

"His excellency the governor directed me to examine the Mississppi and Mexican Gulf Canal, and report the progress of the work to him. I did so on the 23d of April and on the sixteenth of June, and am glad to say that I found the work being pushed with a vigor that was commendable, and so reported. The most powerful dredge-boats and derricks in the Union are employed, and it is astonishing to see the amount of work performed by them. At an early day the canal will be near enough to the Mississippi River to commencebusiness, and early next summer I hope to see the lock completed."

I certify that the above is a true extract from page 65 of the chief engineer's report to the board of public works, and from thence to the general assembly of Louisiana, session of 1871. Said report is dated December 31st, 1870, and can be found in this office.

(Signed) K. BUL. THOMPSON.

64 *Secretary of Board of State Engineers.*

OCTOBER 23D, 1875.

Document I.—Report of M. Jeff. Thompson, ch'f State eng'r, dated 19th June, 1872.

I. Copy. June 19th, 1872.

Dr. J. O. NOYES,
Miss. & Mex. Gulf Canal Co.:

DEAR SIR: In accordance with your request for an abridged statement of the condition of the Mississippi & Mexican Gulf Canal I report that on April 23d, 1869, I examined that work officially, and gave a certificate for three consecqutive miles of more than 70 feet surface, 40 feet on bottom and 10 feet of depth; and on June 16th, 1870, I again examined the work, and gave a certificate for another mile of similar work, and since that time I have several times visited the work, unofficially, and found the work pushed up to the lock-pit, which was partially dug, and the canal from the four-mile post to the lock-pit more than half width.

65 That this work could be now speedily finished, and that it will be a great channel of commerce and profitable if properly managed, there can be no doubt.

Yours most respectfully,

(Signed) M. JEFF. THOMPSON,
Chief State Engineer.

OCTOBER 21ST, 1875.—I certify that the above is a true copy from the letter-book in this office.

(Signed) K. BOL. THOMPSON,
Sect. Board of State Engineers.

Document J.—Report of board of State engineers to the gen'l assembly, dated 31st December, 1872.

J. Lake Borgne Canal.

"There has been no active prosecution of this important work since our last report. At that time the dredges had all been removed to the

city of New Orleans to work upon the drainage canals under the contract between the Lake Borgne Canal Company with the city of New Orleans. This canal now stands much more than half finished, and the only costly work will be the building of the lock, which, at the
66 reduced size authorized by act No. 28, approved April 22d, 1872, will not be a great undertaking. Since the building of the Mobile and New Orleans Railroad much of the anticipated profit and business of this canal has been diverted, yet if completed at reduced depth the lockage, compared with original plans, it can but be profitable to the stockholders and useful to the State and the commerce of the Mississippi River with the Gulf coast. The State has a large interest in the successful completion of this work, which will enable the company to meet their obligations to the State, and eventually retire the bonds issued to them, as contemplated by law. We therefore recommend that such modifications be made in the laws authorizing this work as will enable the company to complete this canal conformably with present necessities and the condition of our city and State finances."

OCTOBER 22D, 1875.—I certify that the above is a true extract from the report of the board of State engineers to the general as-
67 sembly of Louisiana, session of 1873; report dated December 31st, 1872, pages 6 & 7.

(Signed) K. BUL. THOMPSON,
Secretary of Board of State Engineers.

250 *bonds and coupons attached.*

Offered in evidence by pl'ff 1st Dec., 1877; not copied, but to be referred to in original in sup. court.

Document K.—Plaintiff's charter & certificate attached.

Offered in evidence by plaintiff & filed 1st December, 1877; not copied, but to go up in original.

Document L.—Return to commission.

Received & opened by request of pl'ff's att'y, & filed by the clerk Nove'r 19th, 1877. Offered in evidence by pl'ff & filed 1st December, 1877.

Commission.

Fifth district court for the parish of Orleans.

State of Louisiana to any Louisiana commissioner in the State of New York, greeting:

68 No. 8317. Know ye that we, reposing confidence in your prudence and fidelity, do, by these presents, give unto you authority diligently to examine all witnesses whatever, as well on the part of the plaintiff as of the defendant, in a certain suit now pending in the fifth district court for the parish of Orleans, wherein New York Guaranty and Indemnity Co. is plaintiff and the State of La. is def't.

Witnesses, Ch's H. P. Babcock, Jno. W. Marden.

Therefore we desire you, that, at certain times and places by you to be appointed for that purpose, you cause the said witnesses to come be-

fore you; that you then and there examine them apart upon their respective corporal oaths, first taken before you upon the Holy Evangelist; that you reduce their examinations to writing and cause the witnesses to sign the same; and when you shall so have taken them that you send the same with this commission, closed up under you' seal, to us in our fifth district court, in the city of New Orleans,
69 without delay.

Witness the honorable Walter H. Rogers, judge of our said court, this 8th day of November, in the year of our Lord one thousand eight hundred and seventy-seven, and in the one hundred and second year of the Independence of the United States.

[SEAL.] (Signed) PAUL T. ABADIE,
Deputy Clerk.

Interrogatories.

NEW YORK GUARANTY & INDEMNITY COMpany
vs.
BOARD OF LIQUIDATION.
} 5th dist. court. No. 8317.

Interrogatories to be propounded to Chas. H. P. Babcock and John W. Marden, residing in the city of New York, N. Y., the answers to which will be used in evidence on the part of plaintiff on the trial of the above cause.

Int. 1. Are you acquainted with the plaintiff in the above suit, or with the affairs or business of the plaintiff with the Mississippi & Mexican Gulf Ship Canal Co., of Louisiana? If yea, state how and
70 when you first became acquainted with them.

Int. 2. What is your occupation, profession or employment, and how long have you followed such occupation or employment?

Int. 3. Do you know anything of any advances or loans made by the plaintiff to the Mississippi and Mexican Gulf Ship Canal Co., of the State of Louisiana? If yea, state fully and particularly all you know in relation thereto, especially the amount or amounts so advanced or loaned; with whom the same was negotiated and paid; when said transaction took place, and where. Give the dates and amounts of each & every amount advanced by plaintiff to said company.

Int. 4. Was any written obligation or contract entered into between plaintiff and said company? If yea, annex them to your answer; should you be unable to procure the originals, annex sworn copies of the same to your answers, & state whether the signatures to the originals are genuine, & state also how you know that fact.

71 Int. 5. Are the said obligations or contracts the same that were originally given on receipt of the money advanced? If not, state how they came to be changed; by whom the original obligations were given, and to whom the plaintiff paid the money; when & how the said original obligations came to be delivered up, and all the facts & circumstances in relation to the same, as well as the reasons therefor.

6th int. State any & all other facts or matters within your knowledge in relation to the subject upon which you have been interrogated above; particularly, who first applied to the plaintiff for the loan & offered the securities; what representations were made by them to plaintiff, & what were the reasons that interested plaintiff to accept the bonds as security & grant the loan; all in the same manner and as fully as if particularly interrogated in relation thereto.

(Signed) KENNARD, HOWE & PRENTISS &
EDW. PHILLIPS, *Att'ys.*

Affidavit annexed.

STATE OF LOUISIANA,
Parish of Orleans:

72 The undersigned, being duly sworn, says he is the attorney at law of the plaintiff in the above suit; that the said plaintiff is absent from the State; that the testimony sought to be obtained is material & necessary to enable plaintiff to make out his case.

(Signed) EDW. PHILLIPS.

Sworn to & subscribed before me, this 8th Nov., 1877.

[SEAL.] (Signed) PAUL T. ABADIE,
Dep. Clerk.

Waiver to cross-interrogatories.

Cross-examination waived.

(Signed) H. N. OGDEN,
Att'y-General.

Deposition of Chas. H. P. Babcock.

Deposition of witnesses produced, sworn, & examined by virtue of the annexed commission, on the 14th day of November, A. D. 1877, in the city of New York, before me, Moses B. Maclay, a commissioner of the State of Louisiana within & for the city & State of New York, to take depositions, &c., in a certain cause now pending in the fifth district court for the parish of Orleans, State of Louisiana,
73 holding sessions in & for said parish, wherein the New York Guaranty & Indemnity Company is plaintiff, & The Board of Liquidation of the State of Louisiana is defendant.

CHARLES H. P. BABCOCK, being produced & sworn, answers as follows to the interrogatories propounded to him in this cause:

First. To the first interrogatory he answers: I am acquainted with the plaintiff and with its affairs and business with the Mississippi & Mexican Gulf Ship Canal Company of Louisiana. I became so acquainted with them in the summer of 1871. I was then and had for more than two years before that time been vice-president of plaintiff, and as vice-president had dealings with the Mississippi & Mexican Gulf Ship Canal Company, in connection with the making of advances in cash to said company on the security of Louisiana State bonds and the stock of the company.

Second. To the second interrogatory he answers: I am still vice-president of the plaintiff, and am also now secretary of the Cen-
74 tral Trust Company of New York, which latter office I have held since August, 1875.

Third. To the third interrogatory he answers: I know of advances and loans made by the plaintiff to the Mississippi and Mexican Gulf Ship Canal Company of the State of Louisiana. The plaintiff, at the request and on the application of Cyrus Bussey, treasurer of said Mississippi & Mexican Gulf Ship Canal Company, made at plaintiff's office, in the city of New York, in July, 1871, agreed to advance and did advance to said company two hundred thousand dollars on the security of bonds of the State of Louisiana, issued to said company, of the par value of $250,000, to which was added, as additional security, two hundred and fifty shares of one thousand dollars each, nominal value of the capital stock of said company. The bonds & stock were

offered by Mr. Bussey as security for the advances requested by him on behalf of said company, and the said advances were made by the plaintiff on the faith of said bonds, the stock being of small value.

The money was paid by plaintiff to said treasurer by plaintiff's
75 checks drawn as directed by said treasurer on the Bank of America in the city of New York, all of which were paid in due course of presentation. The dates & amount of each & of every amounts advanced to said company were as follows:

July 29th, 1871	$26,000
July 31st, "	10,000
August 1st, "	96,000
August 3d, "	60,000

Amounting, with commissions deducted as agreed upon at the time, to $200,000.

Fourth. To the fourth interrogatory he answers: Written obligations and contracts were entered into between plaintiff and said company; they were the usual agreements taken by the plaintiff in all cases of advances made by it upon securities pledged by the borrower, and were signed by Cyrus Bussey, treasurer of the Mississippi & Mexican Gulf Ship Canal Company. They were signed by him in plaintiff's office and in my presence at the time the money was advanced. It was understood and agreed by Mr. Bussey at the time with the plaintiff that agreements to the same effect would, as soon as possible, be exe-
76 cuted in New Orleans by the president of the company and sent to the plaintiff in New York and substituted for those signed by Mr. Bussey. This was done, and when the agreements signed by the president & Mr. Bussey, with the seal of the company attached, were received those signed by Mr. Bussey alone were given up. The original agreements, signed by Mr. Noyes as president, were in my possession as vice-president of plaintiff until they were annexed by me to my deposition in the suit of the plaintiff against the Mississippi & Mexican Gulf Ship Canal Company taken in this city in 1874. I have not seen them since. I annexed hereto true copies of said agreements marked A and B. The signatures to the original agreements were the original signatures of Mr. Noyes and Mr. Bussey; with the former's signature I am familiar as signed to the certificates of stock of the company in plaintiff's possession, and Mr. Bussey's were appended in my presence before the agreements were sent to New Orleans for completion.

77 Fifth. To the fifth interrogatory he answers: As already stated in my answer to the fourth interrogatory, the original obligations given by Mr. Bussey as treasurer were afterwards exchanged for agreements signed by both the president and treasurer. The first agreements were taken at the time the advances were made, with the express understanding that agreements signed by both the president & treasurer, authenticated by the seal of the company, should be substituted for them, & this was done. The money was paid on the order of Mr. Bussey as treasurer on the faith of this promise, which was performed.

Sixth. To the sixth interrogatory he answers: The loan was first applied for by Mr. Bussey as treasurer of the Mississippi & Mexican Gulf Ship Canal Company, and he offered the securities specified in my previous answer, stating and representing that the bonds of the State of Louisiana were a perfect security for the loan, and that the stock

78 of the company had a prospective value, but the stock was regarded by the officers of plaintiff as only a make-wait. In taking the bonds the plaintiff relied on the recitals printed in the bonds and the act of the legislature of Louisiana printed on the back of them.

Plaintiff' never knew or had any means of ascertaining whether or not there existed any infirmity, informality, or illegality in them; they relied upon the fact that the conditions of the act authorizing their issue had been fulfilled, and that the State, in paying interest on them, had recognised them as valid obligations.

(Signed) C. H. P. BABCOCK.

Taken, subscribed, & sworn to this 14th day of Nov., A. D. 1877, before me the said commissioner.

[SEAL.] (Signed) MOSES B. MACLAY,
Louisiana Commissioner in the City of New York.

Deposition of John W. Marden.

And also JOHN W. MARDEN, being produced and sworn, answers as follows to the interrogatories propounded to him in this case:

79 First. To the first interrogatory he answers: I am. I was employed by plaintiff as accountant from February, 1866, until July, 1875; had an intimate knowledge of their affairs during those years; knew the said company in connection with advances made to it by the plaintiff.

Second. To the second interrogatory he answers: I am an accountant, and have been for twenty years.

Third. To the third interrogatory he answers: I do. On or about the 29th of July, 1871, the said company negotiated with the plaintiff an advance of $100,000, also about August 1st, 1871, another advance of $100,000. Each of said advances were secured by hypothecation of $125,000 of bonds of the State of Louisiana, and one hundred & twenty-five shares of the stock of the said company (Mississippi & Mexican Gulf Ship Canal Company) of $1,000, par value, each share. There

80 was to be a commission of four per cent. deducted from principal. The balance was paid by plaintiff to Cyrus Bussey, treasurer of said company—$26,000, July 29th, 1871; $10,000, July 29, 1871; $96,000, August 1st, 1871; $60,000, August 3rd, 1871. These transactions took place at office of the company (plaintiff's company) in this city.

Fourth. To the fourth interrogatory he answers: A separate contract was made at time of each advance, signed by Mr. Bussey, treasurer, and afterwards exchanged for a contract of like date & character, signed by Mr. Noyes as president, and Mr. Bussey as treasurer of said canal company, with the seal of the canal company on each contract. I have not the originals; two copies are annexed to the deposition of Charles H. P. Babcock in this case, taken before you this day, marked A & B. The signatures to the originals were genuine, I believe, having compared them on certificates of stock known to be genuine.

81 Fifth. To the fifth interrogatory he answers: No; the originals were subsequently exchanged for agreements of a like tenor & date, signed by the president, J. O. Noyes, & treasurer, Cyrus Bussey, of said canal company, having the seal affixed on each. The change was to be made in this way when loan was made. The money was paid to said Cyrus Bussey, treasurer, who signed the original agreements.

Sixth. To the sixth interrogatory he answers: I have answered as fully as I can all the particulars inquired in this interrogatory.
(Signed) JOHN W. MARDEN.

Taken, subscribed & sworn to this 14th day of November, A. D. 1877, before me, the said commissioner.
(Signed) MOSES B. MACLAY,
Louisiana Commissioner in the City of New York.

Copies of agreements, marked A & B, annexed to deposition of Ch's H. P. Babcock.

(See originals annexed to Document "M," at pages 63 et seq.)

82 *Commissioner's certificate.*

STATE OF NEW YORK,
City & County of New York, ss:

I, Moses B. Maclay, a commissioner of the State of Louisiana, residing in the city of New York, to take depositions, &c., do hereby certify that Charles H. P. Babcock and John W. Marden, the deponents, were by me severally sworn to declare the truth on the questions put to them in the same; that the interrogatories were produced to them and their answers thereto taken in writing by me, and subscribed by them respectively in my presence, on the day and at the place in that behalf first aforesaid.

In witness whereof I have hereunto subscribed my name & affixed my seal of office this 14th day of Nov., A. D. 1877.
[SEAL.] (Signed) MOSES B. MACLAY,
Louisiana Commissioner in the City of New York.

Commissioner's fees, $15.60; paid by pl'ff.
(Signed) MOSES B. MACLAY,
Comm'r.

83 *Document M.—Affidavit of Ch's H. P. Babcock, with original agreements B & C, offered in evidence by plaintiff and filed 1st December, 1877.*

Fifth district court of the parish of Orleans, State of Louisiana.

NEW YORK GUARANTY AND INDEMNITY COMPANY
vs.
BOARD OF LIQUIDATION OF THE STATE OF Louisiana.

CITY & COUNTY OF NEW YORK, *ss:*

Charles H. P. Babcock, of said city, being duly sworn, deposes and says that annexed hereto are the original agreements or contracts referred to in his deposition made in this action in the city of New York on the 14th day of November, 1877, the said original agreements or contracts having been received by mail on said 14th day of November, 1877, after the deposition had been completed and the commission fully executed, for which reason they were not annexed to deponent's deposi-

tion, and are herewith returned to the plaintiff's attorneys in New Orleans.

(Signed) C. H. P. BABCOCK.

Taken, subscribed & sworn to this 15th day of November, A.
84 D. 1877, before me, in the city of New York.

[SEAL.] (Signed) MOSES B. MACLAY,
Louisiana Commissioner in the City of New York to take affidavits, &c., 231 Broadway.

Agreement or contract, marked "B," annexed to affidavit.

Commission to maturity paid in advance.

B $100,000.] NEW YORK, 29 *July*, 1871.

Having confided to the management, custody and charge of the New York Guaranty and Indemnity Company the following described property belonging to us, viz:

One hundred twenty-five State Louisiana $7\frac{3}{100}$ % bonds, $1,000 ea.

One hundred twenty-five shares stock Mississippi & Mexican Gulf Ship Canal Co. par value $1,000 per share, and that company having advanced to us upon the same the sum of one hundred thousand dollars, we do, in consideration thereof, hereby agree with the said company to refund said advance, with interest at the rate of seven per cent. per annum, within six months from the date hereof, and that for such advance and interest, together with the commissions and
85 charges hereinafter mentioned, as *as* for all other sums due or owing, or to become due or owing, to the said company from us, the said company shall have a lien prior to all other claims upon the said property and the proceeds thereof; that the said property has been confided to the said company subject to the conditions printed on the other side, and which form a part of this agreement, and that the commissions of said company upon a sale thereof shall be five per cent. upon its gross proceeds; but if no such sale shall be made by the said company, and the advances shall be refunded, and the property withdrawn from its custody, the compensation of the said company for all management and charge of said property whilst in its custody shall be four per cent. upon the amount of such advance over and above all disbursements made by the said company on account of the said property, which, in any event, are to be paid.

[SEAL.] (Signed) JAMES O. NOYES,
President Mississippi & Mexican Gulf Ship Canal Company.

(On margin:) New York Guaranty and Indemnity Company.

86 (Signed) CYRUS BUSSEY,
Treas. M. & M. G. Ship Canal Co.

[5 c. int. rev. stamp.]

Conditions referred to in the instrument on the other side.

1. The New York Guaranty and Indemnity Company shall not be liable for any loss or injury resulting from depreciation, or from any other cause than the gross negligence of the company or its agents, which may happen to the property mentioned in the instrument on the other side whilst in its custody.

2. At, or at any time after, the expiration of the period fixed for

the payment of the advance, if it remain unpaid, the company may, in its discretion, or in the discretion of its president, sell the property at public or private sale, without notice to the owner (if sold at public auction, the company may become the purchasers), and receive its proceeds, which are to be applied, in the first place, to the payment in full of whatever may then be due to the company upon it. Until such sale shall be made and collected, or the advance paid, interest and a
87 pro rata commission shall be charged.

3. In case of a deficiency of such proceeds, it is to be made good by the party receiving the advance, upon demand and immediately after such sale; and if there be a surplus, it is to be immediately accounted for and paid over to the party signing this contract or order.

4. If at any time before the period fixed for the payment of the advance, the market value of the property should be so reduced as not to afford to the company, at the time being, a margin of security for the payment of its advance of at least twenty per cent., additional property to make up such margin, shall, within two days after its being required, be deposited with the company; and if default be made in that respect, the amount of such advance may immediately thereupon, at the option of the company or its president, become due and collectable, as if the period for its limited payment had expired, and the company may immediately proceed as provided for in the second article.

88 5. In case of any fraud, misrepresentation, or concealment in regard to the ownership or character of the property or securities, the company is entitled, under section seven of its charter, to sell the property immediately to reimburse the advance, with interest, cost, and charges, and the owner will be held liable for any deficiency.

(Endorsements.)

This is the agreement referred to by me in my deposition as marked B.

(Signed) C. H. P. BABCOCK.
(") J. W. MARDEN.
(") MOSES B. MACLAY,
Comm'r.

Filed Nov. 22, '75.
(Signed) J. J. HANNON, *D'y Clk.*

Agreement or contract marked C.—Annexed to affidavit.

Commission to maturity paid in advance.

"C" $100,000.] NEW YORK, 1 *August*, 1871.

Having confided to the management, custody, and charge of the New York Guaranty and Indemnity Company the following described property belonging to us, viz, one hundred twenty-five thousand dollars bonds the State of Louisiana.

One hundred twenty-five shares stock Mississippi and Mexican Gulf Canal Co.; par value $1,000 per share.

89 And that company having advanced us upon the sum of one hundred thousand dollars, we do, in consideration thereof, hereby agree with the said company to refund said advance, with interest at the rate of seven per cent. per annum, within six months from the date hereof, and that for such advance and interest, together with the commissions and charges hereinafter mentioned, as well as for all other sums due or owing, or to become due or owing, to the said company

from us, the said company shall have a lien prior to all other claims upon the said property and the proceeds thereof; that the said property has been confided to the said company, subject to the conditions printed on the other side, and which form a part of this agreement; and that the commissions of said company, upon a sale thereof, shall be five per cent. upon its gross proceeds. But if no such sale shall be made by the said company, and the advances shall be refunded, and the property withdrawn from its custody, the compensation of the said company for all management and charge of the said property whilst
90 in its custody shall be four per cent. upon the amount of such advance over and above all disbursements made by the said company on account of the said property, which in any event are to be paid.

MISSISSIPPI & MEXICAN GULF SHIP CANAL COMPANY,
[SEAL.] (Signed) By JAMES O. NOYES,
President.
(Signed) CYRUS BUSSEY,
Treasurer.

[5-cent. int. rev. stamp.]

(On margin p. 89:) New York Guaranty and Indemnity Company.

Conditions referred to in the instrument on the other side.

1. The New York Guaranty and Indemnity Company shall not be liable for any loss or injury resulting from depreciation or from any other cause than the gross negligence of the company or its agents which may happen to the property mentioned in the instrument on the other side, whilst in its custody.

2. At, or at any time after, the expiration of the period fixed for the payment of the advance, if it remain unpaid, the company may, in its discretion, or in the discretion of its president, sell the property at public or private sale, without notice to the owner (if sold at pub-
91 lic auction the company may become the purchasers) and receive its proceeds, which are to be applied in the first place to the payment in full of whatever may then be due to the company upon it. Until such sale shall be made and collected, or the advance paid, interest and a pro rata commission shall be charged.

3. In case of a deficiency of such proceeds, it is to be made good by the party receiving the advance, upon demand, and immediately after such sale; and if there be a surplus, it is to be immediately accounted for and paid over to the party signing this contract or order.

4. If at any time before the period fixed for the payment of the advance, the market value of the property should be so reduced as not to afford to the company, at the time being, a margin of security for the payment of its advance of at least twenty per cent., additional property to make up such margin, shall, within two days after its being required, be deposited with the company. And if default be made in that respect, the amount of such advance may immediately thereupon,
92 at the option of its company or its president, become due and collectable, as if the period for its limited payment had expired, and the company may immediately proceed as provided in the second article.

5. In case of any fraud, misrepresentation, or concealment in regard to the ownership or character of the property or securities, the company is entitled, under section seven of its charter, to sell the property im-

mediately to reimburse the advance, with interest, cost, and charges, and the owner will be held liable for any deficiency.

(Endorsements.)

This is the agreement referred to by me in my deposition as marked "C."

(Signed) C. H. P. BABCOCK.
(Signed) J. W. MARDEN.
(") MOSES B. MACLAY,
Comm'r.

Statement of Auditor Graham, marked C, copied at page 65 of the record No. 3358 of the supreme court, in the suit entitled State of Louisiana ex rel Solomon & Thompson versus James Graham, State auditor, offered in evidence by plaintiff 1st December, 1877.

93 *Document C filed in evidence March 15th, 1871. State debt computed up to 31st day of December, 1871.*

EXISTING DEBT.

Total amount of State bonds as per annual report of 1870		$22,560,233 00
Outstanding auditor's warrants issued between the 1st of April and 31st of December, 1870	1,300,311 81	
Outstanding certificates of indebtedness issued between the 1st of April and 31st December, 1870	293,655 63	
Over	1,593,967 44	22,560,233 00
Bro't over	$1,593,967 44	$22,560,233 00
Outstanding certificates of indebtedness issued under act 5, of 1866	33,630 00	
Balance due on vacant estates	13,529 58	
Due purchasers of lands for redemption of same	15,159 77	
Due on proceeds of slaves sold out of depot	3,781 60	
Due the general government under deposite act	479,919 14	
Amount due the free schools accumulant fund, the same having been 94 borrowed from said fund under act No. 45 of 1863	200,000 00	
Amount due the public land fund under act No. 47 of 1863	117,275 77	
Deposite by syndics of creditors of William Kenner & Co.	2,791 29	2,460,054 59
Over		$25,020,287 59
Bro't over		25,020,287 59

Deposited by creditors of Morgan, Dorsey & Co.	1,446 88
Total	$25,021,734 40

ACCRUING DEBT.

Remaining bonds of the State to be issued in favor of the Mississippi and Mexican Gulf Ship Canal Company, $474,000, having been issued (act No. 116 of 1869) ($126,000.00)	$126,000 00
Remaining bonds of the State to be issued to the North Louisiana and Texas R. Road, the entire length of said road being about 190 miles, at $6,000 per mile, and 91 miles thereof having been already paid for, and included in the bonded debt (act 108 of 1868)	594,000 00
95 Bonds of the N. O. and Mobile and Chattanooga Railroad Company, the payment of which the State guarantees under the first section of act No. 26 of 1869, the entire length of the road being	
Carried over	$25,741,734 40
Am't bro't up	$25,741,734 40
226 miles, at $12,500 per mile	2,825,000 00
Also under act No. 31 of 1870, 5th clause of the 4th section thereof, the entire length of the road being about 200 miles, at $12,500 per mile	$2,500,000 00
Bonds of the State to be issued to the said railroad in accordance with the provisions of the 7th section of act No. 31, 1870	$3,000,000 00
Bonds of the New Orleans, Baton Rouge & Vicksburg Rail R. Co., guaranteed by the State to an amount not exceeding $12,500 per mile of said road and its branches, as per act No. 143 of 1869 (estimated number of miles, 500)	$6,250,000 00
Obligation to subscribe for 1,000 shares of the stock of the Mississippi Valley Navigation Co. of	
	$40,316,734 40
Bro't forward	$40,316,734 40
96 South and West, as per act No. 84 of 1870	100,000 00
Total	$40,416,734 40

RECAPITULATION.

State bonds	$22,560,233 00
Auditor's warrants and certificates	1,593,967 44
Miscellaneous debts	867,533 96
Total	$40,416,734 40
Amount brought forward	$40,416,734 40

Amount of outstanding warrants issued during the months of January & February, 1871.....	$458,730 57
Amount of certificates of indebtedness issued during the months of January and February, 1871.....	$93,443 57
Total am't State debt	$40,968,908 54

STATE OF LOUISIANA—AUDITOR'S OFFICE,
New Orleans, March 15, 1857.

I hereby certify the above and foregoing to be a true and cor-
97 rect statement of the debt of the State on the 1st day of March, 1871.

[SEAL.] (Signed) JAS. GRAHAM, *Auditor.*

Printed auditor's report referred to in above statement, to be used in original. See agreement at page 17.

Document N.—Certificate of Ante. Dubuclet, State treasurer.—Offered in evidence by plaintiff & filed 1st December, 1877.

STATE OF LOUISIANA TREASURER'S OFFICE,
New Orleans, Oct. 30, 1875.

This is to certify that the following described bonds issued to the Mississippi and Mexican Gulf Ship Canal Co. under act No. 116 of 1869, were duly registered in the bond book of the State treasury, to wit:

474 bonds of the State of, $1,000 ea., Nos. 2 to 300 in., No. 306 to 480 in., payable 30 years after date with $7\frac{3}{10}$ interest per annum, payable semi-annually in the city of New York or New Orleans.

Bonds No. 1, 301, 302, 303, 304, and 305, description same as
98 above were not registered in the books of the State treasury, never having been presented for that purpose, although they were regularly issued and appears to be duly registered in the books of the auditor's.

(Signed) ANTE. DUBUCLET,
State Treasurer.

Document O.—Printed pamphlet containing the by-laws, acts, charters, &c., relating to the Mississippi & Mexican Gulf Ship Canal Co.

Offered in evidence by plaintiff & filed 1st December, 1877. Not copied, but to go up in original.

Act No. 35 *of* 1870, *page* 81.

Act No. 72 *of* 1871, *do.* 180.

Act No. 56 *of* 1873, *do.* 111.

Act approved 12*th March,* 1875, *page* 95.

NOTE. These acts are not copied, but will be read in the Supreme Court from the statutes.

Testimony of M. Jeff. Thompson, copied from record No. 6324 *of the Supre. Court at page* 61, *in a suit between the same parties*
99 *offered in evidence by pl'ff 1st December,* 1877.

GEN'L JEFF THOMPSON.

By Mr. PHILLIPS:

Q. Are you engineer of the State?

A. Yes, sir.
Q. How long have you been acting in that capacity?
A. Over eleven years.
Q. You were one of the board of engineers in the spring of 1869?
A. Yes, sir.
Q. Were you called upon to examine the Mississippi & Mexican Gulf Ship Canal?
A. Yes, sir.
Q. In your official capacity?
Ans. Yes, sir.
Q. Did you make such examination?
A. Yes, sir.
Q. Did you make any report of the same?
A. Yes, sir; to the governor.
Q. By whom were you called upon?
A. Governor Warmoth.
Q. Have you a copy of communications you made to him?
A. I have all the papers in my office.
(Paper shown witness.)
100 A. These are copies of the papers in the office.
Q. Look at the first paper. Is that the communication you received?
A. This was one received from Flood. It is a copy of the order I received.
Q. Copy of the order received from Governor Warmoth?
A. Yes, sir.
Q. Is the next document dated April 20th, 1869, a true copy of the letter from Mitchell to you, out of the records of your office?
A. Yes, sir.
Q. According to letter you did make the examination called for?
A. Yes, sir; after reporting to the governor to know what I was to do.
Q. You made the examination as directed?
A. Yes, sir; of Bayou Dupré.
Q. Did you make any report to the governor?
A. Yes, sir.
Q. Look at this report and state if it is correct, dated 31st December, 1870?
Ans. Yes, sir.
Q. Were those certificates delivered to the governor?
101 A. Yes, sir.
Q. Have you made an examination of the work?
A. Yes, sir.
Q. Any evidence—record evidence—of *their* fact?
A. I don't know; I carried the report to the governor myself.
Q. Are the contents of those certificates a true statement of the facts?
(Objection by Judge Cotton. Question withdrawn.)
Q. What was the dimensions of that canal?
A. The bayou had been for a long time almost as large as required by law; a large force of negroes had been put on it to cut off the lumber. It was in many places one hundred feet, and no place less than seventy feet across the top. The points were cut off so as to make it navigable.
Q. Did you sound it?
A. Yes, sir; in many places.
Q. Did you use dredge-boats through to straighten it?

A. Only one in that portion of the bayou.
102 Q. What was the width at the top?
A. Nowhere less than seventy feet.
Q. What was the width at the bottom?
A. Exceeding forty feet.
Q. The whole distance?
Ans. Yes, sir.
Q. And the depth, at ordinary stage of water?
A. Ten feet the time I sounded it.
Q. Was this canal continuous from Lake Borgne?
A. Yes, sir.
Q. So boats could pass?
Ans. Yes, sir.
Q. Boats could pass from one end to the other, the whole four miles—boats drawing not more than ten feet?
A. Yes, sir; at that time.
Q. How many boats did they have?
A. They had June 16th five dredge-boats and two derricks.
Q. Did they have many hands at work?
A. A large number. They were cutting the lock-pit the last time that I was there officially.
103 Q. Was this work of a strictly private nature, or a work of a public character?
(Objection by Judge Cotton.
By PHILLIPS. I offer to prove that the work was of a public nature, and of great importance to the State.
Objection sustained by the court.)

Cross-examination:

Q. When were you appointed State engineer?
A. In October, 1860.
Q. When were your attention first called to this business?
A. I don't think my attention was called to it until I got the order.
Q. At the time you got the order, had any work been done on that canal?
A. Yes, sir. What they had been doing I don't know exactly.
Q. How long had they been at work before you went down?
A. About twenty days they had been at work with one dredge-boat at that time.
(Objection by Mr. Phillips. Overruled by the court.)
Q. You state that they had been at work about twenty days
104 with one dredge-boat.
A. Yes, sir.
Q. Where was that work?
A. (Objection to the examination.
Judge Cotton proposes to show by the witness the importance and extent of the work—the number of hands engaged, Judge Hawkins restricting the proof to the completion of the work, the depth and width of the canal within the time specified in the statute.
Bill reserved by counsel for State.)
Q. What date was it that you first went down to the canal?
A. The 22d day of April, 1869.
Q. Who went with you?
A. Dr. Noyes and his wife.
Q. Who was with you when you first made the survey?
A. I took men from among the employees to row the boat.

Q. Then, there were but two in the skiff at the time you made the survey?

Ans. Two were rowing.

Q. Who cast the rod?

A. I steered and sounded, and steered with the same pole.

105 Q. Where did you commence sounding Bayou Duprés?

A. At Martel's Tower.

Q. Did you sound it by cross-sections?

A. At every point that—my attention as being narrow—I stretched my line across.

Q. Have you got your field-notes of the soundings?

A. No, sir.

Q. Is it not usual for the State engineer to keep these field-notes?

A. Whenever there was any question about the depth I kept them.

Q. How long were you thus engaged in examining the canal?

Ans. Four or five hours.

Q. How many miles did you examine?

A. Three miles.

Q. How many cross-sections in making the soundings?

A. I suppose fifteen or twenty.

Q. When you made a sounding with the pole, did you take a note of the depth?

A. Yes, sir; when it was not over ten feet.

106 Q. You were holding the pole—you had then to take a note of the depth?

A. Only when I touched bottom.

Q. Did you touch any place where it was under ten feet?

A. Closer to the bank I did, sometimes.

Q. Was the canal ten feet in depth all the way through?

A. Yes, sir. In some places, near the bank, it would be shallowed.

Q. Did you make a report to the governor?

A. I took it to him myself.

Q. Did that report embrace the whole three miles?

A. Yes, sir.

Q. Thereupon the governor issued these bonds?

A. I suppose so.

Q. Did you see any of them after that?

A. Not until just to-day, in court.

Q. Was not that a natural bayou, with a natural width and depth?

A. Yes, sir. We had to cut down the trees and cut off the points.

107 Q. It possessed the width by cutting down trees and cutting off points?

A. Yes, sir—pulling up stumps.

Q. What is the length of Bayou Dupré?

A. A little over three miles.

Q. Where did they commence digging the main canal?

A. Across, at the head of Bayou Dupré, at the edge of the timber.

Q. What distance did they cut into the timber?

A. The map will show. I worked by the map.

Q. Have you got the map showing the original course of that bayou?

A. Yes, sir; it is at the office. Mr. Bailey made the map. I can trace it.

(Map of Lake Borgne.)

Q. You have stated that you trimmed the trees and trimmed of' the points?

A. Yes, sir.
Q. That was the condition when you went down there?
A. Yes. sir.
Q. Who was present at that time?
108 A. Dr. Noyes was there.
Q. What's the entire length of that canal?
A. I forget. I think a little over six miles between the lock-pit and the end.
Q. Can you tell the exact time when it—the company—collapsed; when it ceased to act?
A. Some time after the passage of that bill.
Q. Were the dredge-boats taken away?
A. The dredge-boats were taken away before the lock-pit was completed. The company ceased to operate about time.
Q. What is the date?
Ans. I don't remember.
Q. Can you tell by reference to your books when the report was made?
A. No, sir. They were at work last, June 16th, 1870.
Q. You gave certificates for the four miles?
Ans. Yes, sir.
Q. Did that fourth mile extend into the timber?
109 Ans. Yes, sir; nearly up to the river. They had cut one-half of the width, then at the other half.
Q. When did you measure that?
A. June 16th, 1870.
Q. Who assisted you the last mile, in the measurement of it?
A. I forget who it was—there were plenty of men there.
Q. Did that last mile have the requisite depth?
A. Yes, sir.
Q. And the requisite width?
Ans. Yes, sir.
Q. From actual measurement?
Ans. Yes, sir.

Testimony of R. S. Adley, at page 104 *of record No.* 6324 *of supreme court.—Offered in evidence by pl'ff, Dec'r* 1*st*, 1877.

Superior district court for the parish of Orleans.

STATE OF LOUISIANA EX-RELATION NEW YORK Guaranty and Indemnity Company, *vs.* THE BOARD OF LIQUIDATION. } No. 26698.

MR. R. S. ADLEY, for plaintiff:

Q. Did you ever work on the Mississippi and Mexican Gulf Ship Canal?
110 A. Yes, sir.
Q. In what capacity?
A. I was acting as engineer in charge of a dredge-boat.
Q. What year was that?
A. I began in September, 1870.
Q. Did you work there before that?
A. No, sir.
Q. Was there any work done on Bayou Dupré; if so, state what?

A. In so far as the bayou is concerned, I am not familiar with it, but the canal connected with it was deepened in several places, and some narrow points were cut off to make the canal more straight.

Q. Was there any work of that kind done in the first mile?

Ans. I think there was; yes, sir.

Q. In the second and third mile also?

A. I would say there was in the second; I won't be positive, but I think in the third mile, in a great many places timber and logs were taken out, and the canal deepened.

Q. Do you know whether any points were cut off to straighten it?

Ans. Yes, sir.

111 Q. How many dredge-boats were working in there?

A. Nos. one and two commenced at the lake end of the canal; Nos. three and four at the river end, and the fifth, she was about at the central part of the canal. She was at that time the "J. O. Noyes." She cut across a neck of land—I should say nearly half a mile, in order to save a great deal of towing.

Q. Do you know the depth of the water in the canal after it was finished?

A. Well, I think we dug it thirteen feet, and in other places I myself dredged it to 18 feet.

Q. What was the average depth of the canal?

A. I myself dug it 13 feet.

Q. You mean with the boat you had charge of?

A. Yes, sir.

Q. About what do those boats draw?

A. Nearly six feet.

Q. What depth of water do they require to work in?

A. Well, the dipper of these boats will hold two cubic yards
112 of earth, and in swinging around the boat rolls a great deal, causing her to settle down four feet. It is necessary, therefore, to dig ten feet.

Q. The boat cannot work in less than ten feet of water?

Ans. Not in those bayous.

Q. What is the size of those boats?

A. Thirty feet beam, seventy feet in length, and seven feet in the hold.

Q. How do those boats come out of the bayou on the lake side?

Ans. Into the Lake Borgne.

Q. None of them are in the bayou at present?

A. No, sir.

Cross-examination:

Q. How long were you at work on the bayou?

A. Eighteen months.

Q. Who employed you?

Ans. Dr. J. O. Noyes.

Q. In what capacity?

Ans. Engineer of the boat.

Q. What dredge-boat did you work on?

A. Number 3.

Q. Where was she stationed?

113 A. About half a mile from the river end of the canal.

Q. Did she do any work in the first mile?

No answer

Q. In the second mile? From the lake?

Ans. No, sir?
Q. In the third mile?
Ans. No, sir.
Q. What boat were you working on?
A. Number three; down at the lake end.
Q. Where did you work on that boat?
A. Where the canal enters into the lake; I was working at the mouth of the canal.
Q. What distance did you work from the mouth of the canal?
A. I was working at the lake end; I worked on the first straight shoot from the lake up to the in the bayou.
Q. How much did you cut out into the lake; did you cut any at all?
A. I didn't cut any at all with my boat; another boat did, I think, either No. 1 or No. 2.
Q. How far did they cut and channel it?
A. I could not tell you.
Q. How long were you at the mouth?
114 A. I was there three weeks.
Q. Who was in the boat with you?
A. I cannot remember their names.
Q. Did you dredge from that point to this canal in the bayou?
A. Half-way from the entrance up to this.
Q. Did you see a light-house there?
A. I saw what was represented to be a light-house; but there was no light in it.
Q. Did you dredge past this light-house?
A. Yes, sir.
Q. How far?
A. I could not tell what distance, but I dredged around about there; I cannot tell how many feet.
Q. What depth did you cut there at the entrance?
A. Thirteen feet.
Q. What did you do with the dirt?
A. I threw it over on the other side of the channel, to one side on the bank.
Q. What width did you cut that channel?
A. Thirty-five feet.
Q. What is the width of that bayou, when you were entering?
115 A. It varies at that point; it is properly sixty-five feet.
Q. All the way out from edge to edge?
A. I don't know that it will average that.
Q. What was the depth of the bayou when you commenced cutting?
A. There were two boats (Nos. 1 and 2) in there who had the canal dug through, within five blocks of the river, before I could get my boat down there.
Q. You don't know what they done?
A. No, sir.
Q. How long had they been down there before you went down?
A. I cannot tell.
Q. Your dredge was towards the river when the two boats were down at the mouth?
A. Yes, sir.
Q. She was built up near the river end of the canal?
Ans. Yes, sir.
Q. How long did it take her to cut her way down to the bayou?

A. I cannot tell; she had been working before I went into her.

116 Q. What distance had she worked when you went into her?

Ans. I cannot tell.

Q. Was it half-way down to the swamp?

A. She was nearly to the swamp.

Q. How long did it take you to work your way down to the bayou?

A. I was there 10 months—from the fall of 1870 to the summer, I think, of 1871; we met the Nos. one and two.

Q. You met them somewhere in the swamp?

A. Yes, sir.

Q. Where did you pass them?

A. I did not pass them; I shoved back and finished my sections; the river end was my sections.

Q. When was it you went down to the swamp with your boat?

A. After the channel was opened to the river, I went through there with my boat, to the lake, working here and there, where ever it was necessary.

Q. What width is the bayou at this point?

A. I went through there with my boat; my boat is thirty feet wide.

117 Q. This point is one you stated to have been cut off?

Ans. Yes, sir.

Q. You passed through there whilst you were employed?

Ans. Yes, sir.

Q. That was in the fall of 1871. Can you tell the width of that cut?

A. My boat was thirty feet wide, and drawing six feet of water; I went through there with her; I don't know the exact width.

Q. How much had you to spare?

A. I did not take particular notice.

Q. Did you go around this bayou with your boat?

A. No, sir. It was dangerous, because it was too short to get around.

Q. You never went around that curve?

A. No, sir.

Q. When did you get through the upper cut to finish it?

A. I got through, I think, in the fall of 1872.

Q. When you went down to that first mile cut, what became of the other two dredges?

A. They came around to the city to operate.

118 Q. How long did you stay at the first mile cut?

A. Probably three weeks, throwing out sand.

Q. Where did you draw out the logs?

A. At the river end of the canal.

Q. Did you take any trees out of the Bayou Dupré, or draw out any logs?

A. I did not myself.

Q. If you took a log from the bottom of the bayou, or cut a tree that had fallen in the bayou, either was it, in which sections in the first, second, third, or fourth miles?

A. I did not work in the fourth mile.

Q. Or in the cut?

Ans. No, sir.

Q. Did you do anything in the second mile?

A. No, sir.

Q. The only place you did work was in the first mile?

Ans. Yes, sir.

Q. Did you draw a log on any portion of that first mile?

Ans. I did not. No, sir.

Q. What is the width of first mile where you did the work, from the bar up to the mile-post?

119 Ans. It is chiefly a natural bayou.

Q. What is the width of it?

A. I don't know; I judge 60 or 65 feet, where I was working.

Q. How long were you at work?

A. Eighteen months.

Q. Can you fix the time that you worked on the first mile?

A. It was in the latter part of my employment, in the spring or summer of 1870 or 1872.

Q. How long after this was it they drew off all the boats from that canal?

A. It strikes me that I came to town with the boat in 1871 or 1872; I won't be certain.

Q. Was your boat the best dredge?

A. Yes, sir.

Q. How long were the others out before you?

A. I don't know how long.

Q. What length of time intervened between first and your boat?

A. I don't know.

Q. Did you see the other boats at work down there?

A. Yes, sir.

120 Q. At what points?

A. They were dipping through the swamps.

Redirect:

Q. What was the number of the first boat that went in?

A. I don't know; Nos. 1 & 2 were before me; they commenced at the lake end.

Q. They were the only ones that came in that way?

A. Nos. 1 & 2 went in; then the Noyes; the Clam Shell was in cleaning out the bayou.

Q. Did you ever measure the width of that bayou yourself?

A. No, sir; I judged from the span of the crane that it would be about 60 feet.

Order & continuance.—Minutes; 1st December, 1877.

NEW YORK GUARANTY & INDEMNITY CO. *vs.* THE BOARD OF LIQUIDATION, &C. } No. 8317.

This cause came on this day for trial—Edw. Phillips and Ken-

121 nard, Howe & Prentiss for plaintiff, H. N. Ogden & J. C. Egan for defendants—

When, after hearing pleadings, evidence, and counsel, said cause was continued till Friday the 14th inst., at 12 m.

Testimony taken in the clerk's office.—Filed 14th December, 1877.

Fifth district court.

THE N. Y. GUARANTY & INDEMNITY CO. *vs.* THE BOARD OF LIQUIDATION. } No. 8317.

Statement of W. W. Howe.

While practising at the bar, and before I was appointed on the supreme bench, I was employed as counsel of the Mississippi and Mexi-

can Gulf Canal Company. After I went on the bench I disposed of my stock, resigned my position in the company, and ceased further connection with it. I know, however, from settling various cases of the company and of the former firm of Kelly & Howe, that the canal company expropriated a large amount of land along the line from the river to Lake Borgne, and paid for the same about $16,000.

122 Dec. 14, 1877.

(Signed) W. W. HOWE.

Affidavit waived.

CORNELIUS RIORDAN, for plaintiff, sworn, says:

I was employed by the Mississippi & Mexican Gulf Canal Company from February, 1870, till about 1875, as engineer in charge of dredge-boats. I was employed in excavating the fourth mile of the canal, from Lake Borgne towards the river Mississippi. The company used on that mile, in all, four dredge-boats, one of which cost $12,000, and the rest from $20,000 to $25,000 apiece. They were all built by the company but one. The instructions were to dig an average depth of eleven feet at low water, and those instructions were always obeyed. The depth attained in the fourth mile was from 12 to 14 feet at ordinary stage of water. I have no doubt the depth of the fourth mile exceeded ten feet when State engineer gave his certificate in June, 1870. The dredge-boats
123 dug much further down than ten feet, sometimes as far down as 16 to 18 feet. All the dredge-boats were digging as deep as they could. They were the largest ever built in the South. There were two derricks used in the fourth mile in removing the earth from the edge of the canal; they may have cost $3,000 to $4,000 apiece. The canal was dug from Lake Borgne up to the river where the lock-pit is, nearly seven miles in length. The work in first three miles from Lake Borgne consisted in improving the Bayou Dupré. They also dredged out into the lake, and drove piles outside the mouth of the bayou. The 4th, 5th, 6th and seventh miles consisted chiefly of part of the canal which was chiefly artificial. In the 5th, 6th, & 7th miles the canal was only dug 40 feet in width. The lock-pit was dug about 700 or 1,000 feet from the river connecting with the canal. It is about 300 feet long.

The work done by the Mississippi and Mexican Gulf Ship Canal Company on the bayou and canal is a very large work, very ex-
124 pensive, and, so far as done, very well done. I have been an engineer, and engaged in dredging in Louisiana since 1861. I should say that the Mississippi & Mexican Gulf Canal, as it stands, is at least as large a piece of work as the Old Canal Carondelet from the old basin to the Lake Ponchartrain. It must have involved a very large expense. Vessels can go through it from the river bank to the Lake Borgne, and thence to Mobile, &c. I have seen a large schooner going through drawing 7 feet; also the side-wheel steamer Murty, a good-sized steamboat.

Cross-examined:

Q. How do you that the 4th mile was 10 feet deep all the way through?

A. Instructions were to dig eleven feet. I knew depth by water-mark on the dipper-handle of the dredge. I never went through the mile for the purpose of examining the depth. I judge by the general orders and what I heard the men say as they were employed. I
125 cannot of my own knowledge say that the fourth mile was ten feet deep at every point.

I can't swear of my own knowledge that there was an average depth of ten feet through the whole of the fourth mile.

In referring to schooner, I do not say she was drawing 7 feet at that time.

Redirect:

I know that the 4th mile was dug over 10 feet deep, as to that part which was dug by my boats. I knew how the other boats were constructed and how they were working at that time. Eighteen feet was their average plunge.

It would have been less convenient to hold the dipper to a less depth. They were working at this average plunge of eighteen feet. I remember Mr. Adley; he has gone to Canada.

Recross-examined:

Q. Do you of your own knowledge know that the other boats were working at an average plunge of 18 feet.

Ans. No.

126 Redirect:

As to the other boats, I know from their construction that it would be more convenient to work them at from 17 to 18 feet.

(Signed) C. RIORDAN.

Affidavit waived.

Plaintiff's bill of exceptions.—Filed 14th December, 1877.

5th district court.

N. Y. GUARANTY & INDEMNITY CO. *vs.* THE BOARD OF LIQUIDATION. } No. 8317.

Be it remembered that on the trial of this cause, after the plaintiff had introduced its evidence, including the bonds in suit, and the certificates of M. Jeff Thompson, State engineer, (documents marked D, E, F, G, H, I, & J), and had proved by the direct examination of Cyrus Bussey that all the money received by the Mississippi & Mexican Gulf Ship Canal Company from proceeds of State bonds issued under act 116 of 1869 had been expended in the construction of said canal,
127 together with a large amount of private capital, and particularly the sum of two hundred thousand dollars borrowed by said canal company on the pledge of said bonds, the defendant's counsel on direct examination of the witnesses, Merrill and Gillespie, and the cross-examination of Bussey, proceeded to enquire in regard to the amount and value of the work done by said canal company in the improvement of the channel of Bayou Dupré, and the excavation of the artificial portion of the canal for four miles, and mile by mile from the mouth of said bayou at Lake Borgne towards the Mississippi River, prior to the issue of bonds with reference to said miles respectively; and to all said questions, and to all testimony of this kind sought to be elicited thereby, the counsel for plaintiff as the said questions were propounded, duly objected, for the following reasons:

1. That the said questions and testimony were improper and
128 inadmissible under the pleadings, the answer containing no allegation of fraud or error.

2. That said questions and testimony were not admissible to contra-

dict, vary, or modify the recitals in and on the bonds, or the said certificates of a sworn officer.

3. That the evidence prescribed by act No. 116 of 1869, upon which the governor was directed to issue said bonds, was the said certificate of the State engineer, and no other evidence is admissible.

4. That said certificates of the State engineer and the recitals in the bonds by the governor and secretary of state, were and are a decision of a question by sworn officers of the executive department of the State government in whom the act No. 116 of 1869 had vested the power and jurisdiction to decide the same, and whose duty it was to decide the same; that act 116 of 1869 is a part of the contract and *and* the law of the case, and has never been repealed or modi-
129 fied, nor could it be; and that the decision of said executive officers (concerning which no fraud has ever been averred in any way) was and is final, and cannot be enquired into and reversed by the judicial department of the government.

5. That said bonds were issued to aid the construction of the canal, and their purpose, as shown by act No. 116 of 1869, was that they might be negotiated, sold, or pledged; that the evidence furnished by the recitals in the bonds and the said certificates was under the terms of the statute and the pledge of faith therein contained, conclusive in its character in favor of the regularity of the issue of the bonds and the validity of the consideration, and could not be contradicted or qualified by parol testimony offered some seven or eight years after the issue and negotiation of said bonds, and especially as against the plaintiffs, who had advanced two hundred thousand dollars on the faith of said statutes, certificates, and bonds, which money, as
130 shown by direct testimony of Bussey, had been expended on the said canal.

But the court overruled said objections and permitted said questions to each of said witnesses; to which ruling counsel for plaintiff duly excepted, and it was agreed that said objections and exceptions should cover and include all testimony of similar purpose and import.

(Signed) W. H. ROGERS, *Judge.*

DECEMBER 14TH, 1877.

Order & continuance.—Minutes, 14th December, 1877.

THE N. Y. GUARANTY & INDEMNITY CO. *vs.* BOARD OF LIQUIDATION, &C. } No. 8317.

This cause came on this day for trial—Edw. Phillips and Kennard, Howe & Prentiss for pl't'ff; H. N. Ogden & J. C. Egan for defendant—when, after hearing argument of counsel, said cause was continued till to-morrow at 11 o'clock a. m.

131 *Note of evidence & testimony taken & filed 15th Dec'r,* 1877.

State of Louisiana, fifth district court, for the parish of Orleans.

NEW YORK GUARANTY & INDEMNITY CO. *vs.* THE BOARD OF LIQUIDATION. } No. 8317.

Present, Messrs. Phillips & Howe for pl'ff, attorney-general for defendant.

Testimony & notes of evidence offered in open court, on the continuation of the trial of the cause before Hon. Walter H. Rogers, judge.

SATURDAY, 15*th December*, 1877.

NOTE OF EVIDENCE.

The attorney-general, on behalf of the Board of Liquidation, offered in evidence the testimony of Mr. Webster, and the report of Mr. Webster and other experts, in record No. 6324 of the supreme court, from page 95 to page 101 of the said record.

This testimony and report are received subject to the objections of the plaintiff, and it is agreed that the same objections contained in the bill of exceptions signed on the 14th December shall apply to
132 this testimony and report, being objections to the testimony of Morrill, Gillespie & Bussey.

J. G. CHADWICK, witness for plaintiff, sworn:

Q. Mr. Chadwick, were you one of the party that went down with the experts appointed by the superior district court to examine this canal?

A. About two years ago I went down there with a party of gentlemen; I was there as one of their guests.

Q. The experts were Mr. Webster, Mr. Heath, and Mr. Woods?

A. Yes, sir.

Q. Please state to the court something in regard to the magnitude of the work that you found there?

A. After walking a distance, about a quarter of a mile from the river, we found an extensive excavation —a basin embryo.

Q. The lock-pit, you mean?

A. Yes, sir; at that point we took boats and went down the canal. It is a canal much wider than the canal Carondelet. Soundings were taken all the way down to Lake Borgne.

Q. State the extent of that work.

133 A. It was extensive and seemed as if a large amount of money had been extended on the work, judging by the large amounts of excavation on the banks of the canal. I was surprised to find it in such condition after a lapse of seven years since they ceased work on it.

Q. Not since they ceased work, but since they commenced work?

A. Well, sir, since they commenced.

Q. You passed all the way from the lock-pit to Lake Borgne?

A. Yes, sir; and a considerable distance into the lake.

Q. And the canal was sounded all the way by the experts?

A. Yes, sir.

Q. Did you go into the boat with the experts?

A. Yes, sir; I think I was in the boat with the sounding party.

Q. How was the sounding made, with a pole or with a line?

A. With a pole.

Q. How did you make the soundings from one side of the boat, and then from the other side?

134 A. Yes, sir; and we were a long time going down.

Q. What kind of weather did you have that day?

A. It was a mild, pleasant, sunny day.

Q. It was in December, wasn't it?

A. Yes, sir.

Q. Previous to that, what kind of weather had we for some weeks?
A. I don't remember, sir.
Q. Do you remember whether or not the water was of a remarkable hight?
A. No, sir; I don't remember that.
Q. Do you remember that there was a mark on the bank, of the water having been three or four feet high?
A. It seemed previous to the time that we were there the water was higher?
Q. There were no obstacles in the canal as far as you could see from the lock-pit to the lake—there were no bars?
A. No, sir; we did not encounter any bars.
Q. You were in the skiff all the time?
A. Yes, sir.

JAMES M. COOLEY sworn & examined on behalf of plaintiff.

135 Q. You are one of the party of which *of which* Mr. Chadwick has just testified?
A. Yes, sir.
Q. You have heard his testimony I suppose?
A. Yes, sir.
Q. Do you corroborate it?
A. Yes, sir?
Q. Please state whether or not you had observed from the marks on the banks whether the water had been higher than it was that day?
A. Yes, sir; I should judge by the banks and the marks on them that it had been higher, and by the marks on the trees also.
Q. Did anybody go ashore from those boats on that trip; and, if so, when?
A. The only time was when we got to the cut-off, where I called a halt, and we got dinner.
Q. You mean at the place called "Fisherman's Hut"?
A. Yes, sir; that's the place.
Q. That is about three-quarters of a mile from the lake?
A. Yes, sir.

136 Q. Then all the observations of these experts were made from the boat?
A. Yes, sir, entirely; but sometimes a person did step ashore and hold the chain to steady the boat.
Q. Do you remember a growth of weeds along the shore, and how high they were?
A. I don't remember; in some places they were higher than in others.
Q. Did these weeds grow five or six feet high?
A. Yes, sir; in some places.

NOTE OF EVIDENCE.

Plaintiff offers in evidence certain portions of the journal of the house of representatives of the State of Louisiana for the year 1870, which show charges made by Geo. N. Wickliff against Governor H. C. Warmoth, with reference to the issue of the bonds in this suit, and the report of the legislative committee thereon, and the disposition made of the report.

It is agreed that no portion of this journal is to be copied

137 in the record, and either party may refer to it in the original in the Supreme Court.

(Counsel for defendant objects to the introduction of this evidence. Objection overruled by the court. Exception reserved by defendant on the ground of irrelevancy.)

Agreement.

It is agreed by counsel that one of the bonds sued on in this case and marked "R," and filed herein, shall be copied in the transcript of appeal, to show the character of the other bonds. Case submitted.

Testimony of D. Webster, filed & taken Dec. 22, '75.—Copied from record, No. 6324 of Supreme Court, at 119 et sequel.—Offered in evidence by counsel for defendant, 15th December, 1877.

Mr. WEBSTER.

By Judge COTTON:

Q. Did you go down as one of the experts appointed by his honor, to examine the canal?

A. Yes, sir.

Q. Who did you go in company with?

A. Messrs. Wood and Heath, other commissioners, and Mr. Rowland, the surveyor.

138 Q. You took Mr. Rowland for the purpose of aiding you in making an accurate examination?

A. Yes, sir.

Q. Did you make the examination?

Ans. Yes, sir.

(Objections by Mr. Phillips of all proof of this character, on the ground that "one cannot go behind the certificate of the State engineer," and that the examination will not show the condition of the canal at issuance of these bonds. Objection overruled.)

Q. Did you make an accurate and thorough examination?

A. Yes, sir. We made some six hundred soundings, and consumed an entire day.

Q. Your report then was unanimous?

A. Yes, sir; it is filed.

Q. Who drew the diagram attached to it?

A. Mr. Rowland.

(Introduced report with diagram annexed.)

Mr. Phillips objects on the same ground as before.

139 Objection overruled.

Offered in evidence by Judge Cotton, map of the Mississippi and Mexican Gulf Ship Canal and the lands hereunto belonging, marked "Y. Z.")

Q. Witness for plaintiff has stated that the cut from near the first mile point from the Gulf, to a point on the bayou, the second mile as reported on the map was cut; was your attention directed to that cut?

A. Our attention was called to it, but we failed to see the cut.

Q. If there had been a cut sufficiently wide and deep to admit a vessel thirty feet of beam and six feet deep, would you not have seen it?

A. Yes, sir.

Q. You safely say that there was no cut?

A. I can say that I looked for the cut, and failed to find it.

Q. Take the first mile of the bayou—what is the general width of the bayou from the first mile-post to the lake?

A. It is over seventy feet.

Q. What is its depth?

A. It is more than ten feet deep.

140 Q. How far did you sound this portion from the first curve in the bayou, down to the mouth up to this side of the lower?

A. You could tell by referring to the books.

Q. Did you see any indication of mud or dirt being excavated and thrown on the outside?

A. Not in the first mile.

Q. How far out did you sound?

A. Three-quarters of a mile out.

Q. What depth of water did you find?

A. From three to five feet; in some places ten feet.

Q. Did you find any cut around the second mile?

A. We found it was about one hundred yards in length with a channel of six feet on each side.

Q. You proceeded to what point, before you saw other cutting?

A. We saw no evidences in the second mile except those just noted. From the second mile to the third mile—a point part of the way through the lagoon, we found soundings very irregular, being eight feet

141 the greatest, and three feet the least.

Q. Did that indicate that the bayou had filled up since the certificates were given in 1869, or was it wanting in depth originally?

A. We took the water as we found it.

Q. Do you know whether any sediment has fallen into the bayou?

A. My opinion is, that from the sides and from the canal a sediment could go into the bayou; I am told there is a strong current up and down the bayou, made by the wind and tide which could carry it up.

Q. Proceed to the next cutting.

A. We discovered no evidence of work having been done in the third mile of the bayou. From the third to the fourth mile, the soundings ranged from five to nine feet, averaging a little over six feet.

Q. How as to the width?

A. I believe the width to be over seventy feet.

Q. What evidence of work was there in the fourth mile?

142 A. There was no evidence of work in the fourth mile.

Q. W'ere did you find the next work after the fourth mile-post?

A. About ⅛ of a mile on; dredging had been done for about 250 yards.

Q. Where did you find the next work?

A. About three-eighths of a mile further we came to a canal that was about half a mile in the fifth mile.

Q. What is the width of the canal from the four to the four-and-a-half mile point?

A. Seventy feet; the bayou has an average depth of six feet; we found the canal has been made for a distance of 2½ miles to a point two hundred yards from the Mississippi River.

Q. Did you find any evidences of a canal having been dug between points. A. & B.

(Map referred to.)

A. No, sir.

By Mr. PHILLIPS:

Q. You say your attention was called to the width of the bayou at the lower end; by whom was your attention called?

143 A. I believe that I called the attention of the others to it. I took the tracing and called the attention of the others to it.

Q. You say that you saw no dirt thrown on the bank; did you go on shore?

A. No, sir; we staid in the boat and found the depth and width along there.

Q. You did not quit the skiff that you were in?

A. No, sir.

Q. Will you be kind enough to give the date of this examination?

Ans. December 15th.

Q. What is the character of the country along the side of the canal, particularly the lower end?

A. Marshy, prairie, and high weeds, five or six feet in height particularly at the lower end.

Q. What is the character of the vegetation; is it not very rank?

Ans. Yes, sir.

Q. Is it not burnt down very often by the hunters?

A. I presume it is; the prairies are burned, I believe, every year.

144 Q. Does not these weeds grow up in a single season?

A. I presume they do; yes, sir.

Q. Did you notice on the side of the bayou as you went down towards the lake roots laid bare in many places?

A. The only place I noticed was in the canal; I did not observe any in the bayou.

Q. You noticed them in the canals?

A. Yes, sir.

Redirect:

Q. Did you notice any trees growing on the banks of the bayou from the fourth mile-post down to the mouth?

A. In the upper portion of the fourth mile from the lake a few small trees were growing on the bank.

Q. There were no trees on the banks down at the mouth?

A. None that I noticed.

(Map referred to.)

Q. On this map, does not the yellow portion indicate the marsh, and the blue the timber?

Ans. Yes, sir.

145 Q. In going down, how did you take the soundings?

A. We took the soundings zigzag; coming back we took the soundings in the center of the bayou.

Q. What instrument did you use to measure the length?

A. We adopted the chart for the length.

Q. How for the width?

A. We measured in a few places; but we could tell by our eye' that it had sufficient width.

Q. Then it had, the first two or three miles, sufficient width?

A. It had sufficient width. It had sufficient depth in the first mile and a fraction of the second.

Reports of Experts Webster, Heath & Woods, referred to in D. Webster's testimony, (above) from p. 95 *to* 101 *of record* 6324. *Offered in evidence by counsel for def't, 15th December,* 1877.

NEW ORLEANS, LA., *December 21st,* 1875.

To the Hon. JACOB HAWKINS,
Judge of the Superior District Court:

146 SIR: In obedience to your order of November , 1875, ap-

pointing us a board of experts to examine and report the width, depth, length, condition, and where work had been done on the canal, known as the Mississippi and Mexican Gulf Ship Canal, have the honor to submit the following:

All distances are estimated from the mouth of Bayou Dupré or Phillippon, at Lake Borgne.

We proceeded to Canal or Bayou Dupré on the morning of December 15th, 1875, & measured.

From the mouth of this bayou, spiles have been driven out into Lake Borgne to a distance of about two-thirds of a mile, and are in a fair state of preservation. Soundings were made from the end of these spiles to a point abreast of Fort Dupré, with a depth ranging from three feet to six feet. In our opinion some dredging has been done along the line of these spiles, but we cannot estimate the amount. From the mouth of Bayou Dupré, following the bayou to a point known and marked on the survey as Fisherman's Hut, a distance of
147 about one mile, we find the depth of water and the width of the bayou greater than that required by the act referred to in your order. There is no evidence whatever of any work having been done in this mile of the bayou.

At about one and one-quarter miles from the mouth of the bayou, and at about one-quarter mile from the Fisherman's Hut, a cut-off or canal has been dug, about one hundred yards in length, making a small island with a channel on either side, of six feet. From this island, still following the bayou, we find from eight to nine and one-half feet depth of water, but no evidence of work having been done up to the second mile, except that just noted; but we find the natural bayou in width up to the requirements of the act, for the entire second mile.

From the second mile to the third mile—a point about half-way through the lagoon, the soundings are very irregular, the greatest being eight feet, and the least three feet—the majority of the
148 soundings being less than eight feet—giving an average of five and three-quarter feet. The width of the bayou is over seventy feet. We discovered no evidence of work having been done in the third mile from the mouth of the bayou.

From the third to the fourth mile, the soundings range from five feet to nine feet, averaging six and seventeen-twentieths feet. The width of the bayou we find greater than seventy feet. There is no evidence of work having been done on this the fourth mile.

At about four and one-eighth miles from the mouth of Bayou Dupré dredging has apparently been done for about two hundred and fifty yards, making an island, but with a channel only by way of the bayou, and none through the apparent cut-off or canal. The work, if any done, is now overgrown with vegetation. Following the bayou about three-eighths of a mile further we came to a canal. The width
149 from the four, to the four and one-half mile point is over seventy feet, but the bayou has an average depth of only six feet.

From the four and one-half mile point, we find a canal has been dug for a distance of about two and one half miles, to a point within two hundred yards of the Mississippi River. The direction of the canal is south seventy-seven degrees west. This canal varies much in depth and width on account of having never been completed. For about one mile the width is seventy feet with soundings ranging from five and one half feet to no bottom at ten feet.

From this point, about five and one-half miles from the mouth of

Bayou Dupré to the end of the canal, a distance of about one and a half miles, or seven miles from the mouth of Bayou Dupré, the soundings range from two and one-half feet to no bottom at ten feet. The width is under seventy, averaging about fifty-five feet.

We would call your honor's attention to the fact that we made
150 use of the survey made by C. Norstrand, esq., civil engineer and surveyor, and approved by the board of State engineers, for the distances between the mouth of Bayou Dupré and the termination of the canal. We believe that the distance between these two points is about correct. The tide rises and falls about one foot in calm weather, and we should judge the water in the bayou and canal would be much affected by the direction and the force of the wind, as we observed there was evidence on the banks of the bayou of the water having recently been from three to four feet higher and believe the water in the bayou to have been unusually low at the time we made the survey.

(Signed) D. WEBSTER.
(") E. HEATH.
(") R. H. WOODS.

Order & continuance.—Minutes, December 15th, 1877.

NEW YORK GUARANTY & INDEMNITY CO. vs. BOARD OF LIQUIDATION, &C. } No. 8317.

151 This cause came on this day for trial—Edw. Phillips and Kennard, Howe & Prentiss for plaintiff; H. N. Ogden & J. C. Egan for defendant—when, after hearing further evidence and argument of counsel, said cause was continued till Monday next at 11 o'clock a. m.

Order (cause submitted.)—Minutes, 17th December, 1877.

N. Y. GUARANTY AND INDEMNITY CO. vs. THE BOARD OF LIQUIDATION, &C. } No. 8317.

This cause came on again to-day for argument—Edw. Phillips and Kennard, Howe & Prentiss, for pl'ff's; H. N. Ogden, attorney-general, for defendant—when, after hearing further argument of counsel, said cause being submitted, the court took the same under advisement.

Judgment.

Fifth district court, &c.

NEW YORK GUARANTY & INDEMNITY COMpany vs. THE BOARD OF LIQUIDATION, &C. } No. 8317.

152 In this case, for the reasons orally assigned in open court this day—

It is ordered, adjudged, and decreed that there be judgment in favor of defendant, with costs.

Judgment rendered January 15th, 1878.
Judgment signed January 19th, 1878.

(Signed) W. H. ROGERS, *Judge.*

Motion & order for appeal.—Filed January 19th, 1878.

Fifth district court.

NEW YORK GUARANTY & INDEMNITY CO.
vs.
THE BOARD OF LIQUIDATION. } No. 8317.

On motion of Kennard, Howe & Prentiss and E. Phillips, of counsel for plaintiff, and on suggesting that, as they are informed and believe, there is error to the prejudice of said plaintiff in the final judgment herein rendered on the 15th day of January, 1878, and signed on the 19th day of January, 1878, and that plaintiff is aggrieved thereby—

It is ordered that the plaintiff be allowed an appeal from said judg-
153 ment, returnable to the supreme court on the first Monday of February, 1878 (there not being time to finish the transcript before), on furnishing bond, with good and solvent surety, conditioned as the law directs in the sum of two hundred dollars.

Appeal bond.—Filed 21st January, 1878.

Know all men by these presents that we, The New York Guaranty and Indemnity Company, as principal, and Edward Phillips, as surety, are held and firmly bound unto Thomas Duffy, clerk of the fifth district court for the parish of Orleans, his successors, executors, administrators, and assigns, in the sum of two hundred dollars, for the payment whereof we bind ourselves, our heirs, executors, and administrators, firmly by these presents. Sealed with our seals, and dated in the city of New Orleans, on this 21st day of January, in the year of our Lord one thousand eight hundred and seventy-eight.

Whereas the above-bounden N. Y. Guaranty and Indemnity Com-
154 pany, on January 19th, 1878, filed a motion of appeal from a final judgment rendered against it in the matter of the New York Guaranty and Indemnity Co. vs. The Board of Liquidation, No. 8317, in the fifth district court, for the parish of Orleans, on the 15th day of January, 1878, and signed on the 21st day of January, 1878:

Now, the condition of the above obligation is such that the above-bounden appellant shall prosecute its said appeal, and satisfy whatever judgment may be rendered against it, or that the same shall be satisfied by the proceeds of the sale of its estate, real or personal, if it be cast in the appeal; otherwise that the said surety shall be liable in its place.

(Signed) THE NEW YORK GUARANTY & INDEMNITY COMPANY,
Per KENNARD, HOWE & PRENTISS, [L. S.]
Its Attorneys.
(Signed) EDW. PHILLIPS. [L. S.]
Signed, sealed, & delivered in the presence of—

Plaintiff's bill of exceptions.—Filed 30th January, 1878.

5th district court.

THE N. Y. GUARANTY & INDEMNITY CO.
vs.
THE BOARD OF LIQUIDATION. } No. 8317.

155 Be it remembered that on the trial of this cause the plaintiff offered the certificate of R. G. Deslonde, secretary, &c., to shew

funding of bonds of same issue as those sued on, and hereto annexed; but on objection by the counsel for defense that the same was irrelevant it was ruled out by the court, and the counsel for plaintiff duly excepted.

(Signed) W. H. ROGERS, *Judge.*

No objection.

(Signed) J. C. EGAN,
Ass't Att'y-General.

Certificate of secretary of state (Deslonde) annexed to bill of exceptions.

STATE OF LOUISIANA.

OFFICE SECRETARY OF STATE,
New Orleans, November 17th, 1875.

I hereby certify that the records of the Board of Liquidation show that the following bonds issued to the Mississippi and Mexican Gulf Ship Canal Company under act 116, approved March 8th, 1869, were funded at the several meetings of the said board as specified below:

August 25th, 1874, sixty-one of one thousand dollars each; March 8th, 1875, one hundred and twenty-four of one thousand
156 dollars each.

Given under my hand and the seal of the State, this seventeenth day of November, A. D., in the year of our Lord one thousand eight hundred and seventy-five, and of the Independence of the United States the one hundredth.

[SEAL.] (Signed) P. G. DESLONDE,
Secretary of State.

Agreement dispensing the copying of bonds.—Filed 30th January, 1878.

NEW ORLEANS, *Jan'y 30th*, 1878.

5th dist. court.

NEW YORK GUARANTY AND INDEMNITY COMPANY
vs.
BOARD OF LIQUIDATION. } No. 8317.

The bonds offered in this case may be referred to in original in the supreme court.

(Signed) KENNARD, HOWE & PRENTISS,
For Pl'ff.

(Signed) J. C. EGAN,
For Def'd't.

State of Louisiana, fifth district court, for the parish of Orleans.

I, Thomas Duffy, clerk of the fifth district court for the parish
157 of Orleans, do hereby certify that the foregoing one hundred and twenty-two pages do (together with three printed documents hereto annexed, and with the exception of those which are to be referred to, or read in original or from the printed statutes in the supreme court, as per agreements of *of* record and on file, which documents are hereafter described) contain a true, correct, and complete transcript of

all the proceedings had, of all the documents filed, and of all the testimony and evidence adduced on the trial of the cause wherein The New York Guaranty and Indemnity Company is plaintiff and The Board of Liquidation, &c., is defendant, instituted in this court and numbered in its docket 8317.

Printed documents annexed to transcript.

Exhibit A annexed to petition, being the charter by-laws of the plaintiff.

A certified copy of the act of incorporation of the plaintiff and an act amendatory thereto.

Document O, a pamphlet containing contracts, charter, amend-
158 ments, and by-laws of the Mississippi & Mexican Gulf Ship Canal Co.

Documents to be referred to in original.

The 250 bonds sued on herein.

The act No. 116 of March 8th, 1869; act No. 35 of 1870, page 81; act 72 of 1871, page 180; act No. 56 of 1873, page 111; act approved 12th March, 1855, page 95; journal of the house of representatives of this State for the year 1870, and the report of legislative committee; the report of the State auditor to the gen'l assembly; and the records Nos. 3358 and 6324 of supreme court.

In testimony whereof I have hereunto set my hand and affixed the seal of the said court, at the city of New Orleans, on this thirty-first day of January, in the year of our Lord one thousand eight hundred and seventy-eight, and the one hundred and second year of the Independence of the United States.

[SEAL.] (Signed) THOMAS DUFFY, *Clerk.*

ATTORNEY-GENERAL'S OFFICE,
STATE OF LOUISIANA,
New Orleans, Feb'y 4th, 1878.

159 N. Y. GUARANTY & INDEMNITY COMPANY
vs.
THE BOARD OF LIQ'N.

The report offered by defendants contains a reference (p. 108) to a diagram, which is not annexed. It is consented that it may be copied from the transcript of former trial, No. 6324, and attached to the transcript in this case, or referred to in as contained in said transcript 6324 of supreme court.

(Signed) W. W. HOWE,
ED. PHILLIPS,
For Pl'ff.

(") H. N. OGDEN,
Att'y-Gen'l.

UNITED STATES OF AMERICA,
State of Louisiana:

Supreme court of the State of Louisiana.

THE NEW YORK GUARANTY AND INDEMNITY Company
vs.
THE BOARD OF LIQUIDATION, ETC.
No. 6939.

160 TRANSCRIPT OF APPEAL.—FILED 4TH FEBRUARY, 1878.

Motion to fix cause for trial.—Filed 12 March, 1878.

N. Y. GUARANTY & INDEMNITY CO.
vs.
BOARD OF LIQUIDATION.
Supreme court. No. 6939.

On motion of Ed. Phillips and Kennard, Howe & Prentiss, for plaintiffs, and suggesting that this suit is brought under act No. 11 of 1875, extra session, ordered that the cause be set for trial, by preference, for Wednesday, the 20th March, at 11 a. m.

Order fixing cause for trial.—Extract from the minutes, Tuesday, March 12, 1878.

The court was duly opened; present, their honors Thomas C. Manning, chief justice, and Robert H. Marr, Alcibiade De Blanc, William B. Egan, William B. Spencer, associate justices.

NEW YORK GUARANTY AND INDEMNITY Company
vs.
BOARD OF LIQUIDATION.
No.

On motion of Edward Phillips and Kennard, Howe & Prentiss,
161 of counsel for plaintiffs and appellants, and upon suggesting to the court that this suit is brought under act No. 11 of 1875, extra session, it is ordered by the court that this cause be set down for trial, by preference, for Wednesday, the 20th day of March, A. D. 1878, at 11 o'clock a. m.

Cause submitted.—Extract from the minutes, Wednesday, March 20, 1878.

The court was duly opened; present, their honors Thomas C. Manning, chief justice, and Robert H. Marr, Alcibiade De Blanc, William B. Egan, William B. Spencer, associate justices.

NEW YORK GUARANTY AND INDEMNITY Company
vs.
BOARD OF LIQUIDATION.
No. 6939.

This case was called for trial, and having heard argument from William W. Howe and John H. Kennard, of counsel for plaintiff and appellant, and James C. Egan, assistant attorney-general of the State

of Louisiana, on behalf of the defendant, appellee herein,
162 the court took the case under advisement upon the briefs on file and to be filed on or before the 30th inst.

Judgment and decree.—Extract from the minutes, Friday, May 31, 1878.

The court was duly opened; present, their honors Thomas C. Manning, chief justice, and Robert H. Marr, Alcibiade De Blanc, William B. Egan, William B. Spencer, associate justices.

His honor Justice Egan pronounced the judgment and decree of the court in the following case:

THE NEW YORK GUARANTY AND INDEMNITY Company *vs.* THE BOARD OF LIQUIDATION, ETC. } No. 6939.

On appeal from the fifth district court, for the parish of Orleans.

The judgment was correct and is affirmed.

Opinion of the court.—Filed 31 *May*, 1878.

163 THE NEW YORK GUARANTY AND INDEMNITY Company *vs.* THE BOARD OF LIQUIDATION, &C. } No. 6939.

Mr. Justice EGAN:

The plaintiff brought this suit under act No. 11 of the legislature of Louisiana approved May 17th, 1875, to procure the final decree of this court declaring certain bonds issued originally to the Mississippi and Mexican Gulf Ship Canal Company, under act 116 of 1869, "legal and valid obligations of the State; that they were issued in strict conformity to law, and not in violation of the constitution of this State or of the United States, and for a valid consideration," as a prerequisite to and with the view of having them funded or exchanged for consolidated bonds of the State, under act No. 3 of 1874. The petition contains all the necessary allegations, and sets forth that said bonds have been repeatedly and constantly recognized as valid by the executive, legislative, and judicial branches of the government, and more es-
164 pecially at the instance of the State in the case of the State vs. Graham, auditor—A. p. There was an exception to the petition on grounds which were permitted in the court below to be cured so far as they could be by the filing of an amended petition. The answer is a general denial.

The act under which the bonds purport to have been issued provided for the issuance in aid of the canal company of bonds of the State not to exceed six hundred thousand dollars on certain conditions therein named, viz:

When the said Mississippi and Mexican Gulf Ship Canal Company, beginning at the mouth of bayou Duprés, on the shore of Lake Borgne, shall have completed the proposed canal for a distance of one mile to the depth of ten feet at ordinary stage of water with a width of seventy feet at the top and forty feet at the bottom, either by excavating on a new line or by widening, straightening, and deepening the
165 channel of Bayou Duprés, then, upon the certificate of the State

engineer, or of any one of the engineers of the board of public works selected by the governor of the State, that the said work has been done as above provided, the governor of this State is hereby authorized and directed to issue the bonds of the State to the amount of one hundred and twenty thousand dollars, according to the provisions of this act. That when the said company shall have completed the second, third, and fourth miles of said work to the width and depth of the first mile, so as to form a continuous canal, then, upon the certificates of the engineer, as before provided, that the second, third, and fourth miles are so completed, each certificate being given on the completion of each of said miles, the governor is hereby authorized to issue to said company, under the provisions of this act, on the comple-
166 tion of each of the said three miles, the bonds of the State to the amount of one hundred and twenty thousand dollars. That when said canal company shall have entirely completed the said canal to the width and depth above specified, with a good and substantial lock at least three hundred feet long and eighty feet wide, so as to afford navigation at ordinary stage of water in Lake Borgne, from the Mississippi River into Lake Borgne, then, upon the certificate of the engineer, as above provided, that the work is so far finished, the governor of this State is hereby authorized and directed to issue the bonds of the State to the amount of one hundred and twenty thousand dollars ($120,000); making a total of six hundred thousand dollars ($600,000).

This act was approved on the 8th of March, 1869. There were but two issues of bonds, one in June, 1869, for the first three miles indiscriminately, and the other in June, 1870, for the fourth mile. The
167 bonds were all required to be dated the 1st of March, 1869, were for $1,000.00 each, with coupons attached bearing interest at $7\frac{3}{10}$ per cent. per annum, payable semi-annually, and were payable in 30 years.

There is nothing in the evidence to show for what part of the work the bonds held by the plaintiff, 250 in number, were issued, except that they were of the first. It seems that the interest was paid for a time, and then the payments stopped. These bonds were among those which were proscribed by act No. 11, before mentioned, and their funding was prohibited without first obtaining the decree now sought. They are the same which were before us at the last term on an application by mandamus to compel their funding without first obtaining the decree required by act No. 11. They were issued upon the certificate of an engineer of the board of public works that the work was completed according to the statute. It is now contended that this certificate
168 is conclusive of that fact, and that evidence that the work was not so completed, and that the conditions of the law were not complied with, was improperly received in the court below. The authorities cited on behalf of the plaintiff, and other adjudications of this court not cited, sustain this position so far as relates to ordinary actions, and were this one for the recovery of the amount of the bonds in question we should not hesitate to rule accordingly. There are, however, several considerations going to show that the principle invoked does not apply to this peculiar statutory action required by the amendment to the funding bill, which was in itself nothing more than a tender by the State of a new contract to its creditors on certain conditions as to the bonds held by plaintiffs, and other proscribed or suspected bonds, a compliance with which was made a prerequisite to their sharing the benefits of the funding act. The plaintiffs has been careful not merely to offer evidence of the prerequired certificate of the engineer, but has gone further

and offered in evidence the report of that officer and of the board of engineers to the legislature to the same effect, and also the auditor's and treasurer's report that these bonds were outstanding, and that all but one of them (No. 1) had been registered on the treasurer's books, under the statute. The legislature then knew full well when it passed act No. 11 of 1875, requiring, as a prerequisite to their being funded, that the bonds of the class and issue held by plaintiff should be ascertained not only to have been issued in conformity to law, and not contrary to the constitution of the State or U. S., but also for a valid consideration; that the required certificate of the engineer had been given before the issuance of the bonds. They also knew that the bonds had been negotiated and had passed into the hands of third persons. How idle, then, would it have been to have required this court to find the several facts required by the act if either the possession of the bonds by third bona-fide holders or their issuance after and upon the authority of the engineer's certificate was to shut off enquiry into their consideration or their issuance in conformity to law, i. e., that the conditions of the act had been complied with. Again, the counsel for the plaintiff has taken pains to inform us why these bonds were made a subject of suspicion and denied the privilege of being funded, as other recognized obligations of the State, without the previous judicial enquiry provided for by act No. 11. We are thus informed as well by the legislative journal, in the record, that it was, at least in part, because of the State auditor having preferred against the governor the charge of having issued to the Mississippi and Mexican Gulf Ship Canal Company bonds to the amount of $354,000 in violation of law, said bonds having been issued by him before the law had been complied with, the work never having been done as required by law, and that the State was thus defrauded to that amount. Whether this be the origin of the suspicion attached to these particular bonds or not, it is quite evident that the legislature had some good reason for including both them and other issues among the proscribed class which the board were positively forbidden to fund without the previous judicial ascertainment of the fact that they had been issued in strict conformity to law and for a valid consideration. It is part of the history of the times that the credit of the State was so freely and so improperly used and abused during what is styled the reconstruction era that it was not only natural but wise that the courts should be not only authorized but required to go beyond the mere surface, the mere compliance with the forms of statutes, and enquire into the real facts of the case, as was the evident legislative intent that they should do under act No. 11 of 1875. We have uniformly held, in all the cases which have come before us under that act, that the ordinary rules of evidence in regard to negotiable paper passing before maturity into the hands of even innocent third persons, for value, did not preclude or excuse us from going into the question of consideration or any other enquiry made necessary by the act, no more than we think that did the legislature intend us to stop an enquiry into the validity of the bonds in question and the lawfulness of their issue and consideration merely at and because of the fact, well known to them already, that the certificate of the engineer, the officer pointed out by the act 116 of 1869, had been obtained and given before the bonds were issued. No judicial enquiry would have been necessary, and none would have been ordered, had that been the limit. The plaintiffs are not here asserting in an ordinary action upon the bonds the rights to recover their amount; they are asking to remove the

cloud of suspicion which attaches to their bonds, in order that they may accept the offer of consolidated bonds made by the State to its creditors. This they cannot do except by complying with the conditions and making the proof required by the act, which, for this purpose, knows no distinction of persons or holders, and which commands and requires full enquiry into the original legality and valid consideration of the bonds. Indeed, plaintiff's counsel, while excepting to the evi-
173 dence on this subject offered by the defence, have themselves gone behind the engineer's certificate and the action of the other State authorities, not only by cross-examining the witnesses for the defence, but by offering on behalf of the plaintiff the testimony of several witnesses, including the engineer himself, to prove affirmatively compliance with the statute and the character and extent of the work done. They cannot under the law object to the evidence being considered. In regard to the recognition by State officials of the bonds in question, it need only be remarked that the validity, legality, or consideration of the bonds could not be affected by any such acts or recognition. No such power existed in any officer or branch of the government, not even the legislature. If void, the bonds were not susceptible of ratification, and the constitution of 1868, article 110, expressly provides that "no retroactive law shall be passed," and, if so, certainly not any action by any State officer. The same may be said of the alleged judicial recognition in proceedings to which the plaintiffs were
174 not parties. Leaving these matters out of view then, which can have no effect in determining the present issues, the plaintiff's evidence consists, so far as is necessary to discuss it, aside from the bonds themselves, in the detail and certificate of the engineer, which conforms to the statute, in an unauthorized report of that officer to the president of the company in his official report, and in the testimony of witnesses, of whom he is the first. He states that the bayou had been for a long time almost as large as required by law, that the points were cut off so as to make it navigable, and that it had the requisite dimensions for four miles. On cross-examination he states that he first went down to examine the canal on April 20th, 1869, a little over one month after the passage of the act authorizing the issue of the bonds; that they had been at work about 20 days with one dredge-boat; that he went with Dr. Noyes, president of the company, and his wife. When asked "Who was with you when you made the first sur-
175 vey?" he answers, "I took men from among the employees to row the boat." When asked if there were but two in the skiff when he made the survey, he answers, "Two were rowing." When asked who cast the rod, he answers, "I steered and sounded, and steered with the same pole." He further states that he has no field-notes of the soundings; that whenever there was any question about the depth he kept them; but they were not produced, and, as we have seen, he had just denied having any. He says he was engaged four or five hours in examining the three miles; that at any point that called his attention as being narrow he stretched his line across; that he made, he supposes, fifteen or twenty cross-sections. In reply to the question, "When you made soundings with the pole did you take a note of the depth?" he answers. "Yes, sir, when it was not over ten feet." Q. You were holding the pole? You had to take a note of the depth? A. Only when I touched bottom. Q. Did you touch any place where it was under ten feet? A. Close to the bank I did sometimes.
176 Q. Was the canal ten feet in depth all the way? A. Yes, sir. In some places near the bank it would be shallower. Q. Did

you make a report to the governor? A. I took it to him myself. Q. Did that report embrace the whole three miles? A. Yes, sir. Q. Thereupon the governor issued these bonds? A. I suppose so. Q. Was not that a natural bayou, with natural width and depth? A. Yes, sir; we had to cut down trees and cut off the points. Q. It possessed the width by cutting down trees and cutting off the points? A. Yes, sir; pulling up of stumps. Q. What is the length of Bayou Duprés? A. A little over three miles. Q. Where did they commence digging the main channel? A. Across at the head of Bayou Duprés; at the edge of the timber. Q. What distance did they cut the timber? A. The map will show. Q. You have stated that you trimmed the trees and trimmed off the points? A. Yes, sir. Q. Was that the condition when you went down there? A. Yes, sir. Q. Who was present at the time? A. Dr. Noyes was there." (Dr. Noyes was president
177 of the canal company.) "Q. What is the entire length of the canal? A. I forget; I think a little over six miles between the lock-pit and the end." (Other witnesses fix the length about 7 miles.) "Q. Can you tell the exact time when the company collapsed; when it ceased to act? A. Soon after the passage of that bill." (Meaning no doubt act No. 30 of 1871, to provide for the drainage of New Orleans.) "Q. Were the dredge-boats taken away? A. The dredge-boats were taken away before the lock-pit was completed. The company ceased to operate about [that] time. Q. What is the date? A. I don't remember. Q. Can you tell by reference to your books when the report was made? A. No, sir; they were at work last, June 16th, 1870. Q. You gave certificates for the four miles? A. Yes, sir. Q. Did that fourth mile extend into the timber? A. Yes, sir; nearly up the river. They had cut one-half of the width, then cut the other half. Q. When did you measure that? A, June 16th, 1870. Q. Who assisted you the last mile in the measurement of it? A. I forgot who it was; there were plenty of men there. Q. Did that last mile have the requisite
178 depth? A. Yes, sir. Q. And the requisite width? A. Yes, sir. Q. From actual measurement? A. Yes, sir."

This witness was the State engineer, who seems also to have identified himself with the canal company from his frequent use of the pronoun "we" in speaking of the work. He was the principal witness for the plaintiff. The foregoing extracts from his testimony will but show how much importance is to be attached to it and to the accuracy and carefulness of his survey and to his certificate (based on such an examination) that the work had been done according to the requirements of the act, and that the company was entitled to four hundred and eighty thousand dollars of the bonds of the State, which were accordingly issued, and of which the two hundred and fifty held by the plaintiff form a part. An excursion on a summer's day in company with the president and his wife; an examination and soundings with a pole with which he also steered, lasting only four or five hours and extend-
179 ing over three miles of bayou or canal; the possession or production of no notes of the soundings and measurements; the absence of any assistants or of the use of any proper and usual appliances for the measurements, as shown by the testimony of the engineer himself, are the best commentary upon the value to be attached to his official report, upon which the plaintiffs mainly rest their case. This report made under such circumstances, and within a little more than one month after the passage of the act, formed the basis on which bonds of the State were issued to the canal company to the amount of three hundred and sixty thousand dollars, being at the rate of $120,000 per

mile for the first three miles. The additional issue for the 4th mile of $120,000 was based upon another report of the engineer, which may be judged of by the first and by the light of other evidence in the case. The next witness for the plaintiff is Adley, who commanded one of the dredge-boats which was built near the river end of the canal
180 and used on that part of it for which the bonds were not issued, and which it is not pretended was ever finished according to the requirements of the act. He says the river end was his section; that he did no work on the first four miles; was engineer on the best of the dredge-boats which passed through the bayou, drawing six feet, and his boat was thirty feet wide. He never made any measurement of width or depth but by the length of the crane of the dredge-boat; thinks the bayou was 60 feet wide. He was afterwards for a time dredging at the entrance of the bayou to the lake; dug 13 feet in depth and cut the channel 35 feet wide. Could not tell the width of the cut at the point; went through there with his boat. The boats were all sent away to New Orleans. Cornelius Riorden, plaintiff's witness, says he was employed in cutting the 4th mile, the depth attained in which was 12 to 14 feet at ordinary stage of water. Cross-examined, he cannot say of his own knowledge that the 4th mile would aver-
181 age 10 feet deep all the way through. He judged by the instructions, which were to dig 11 feet by the water-mark on the dipper-handle, and by what the men said; he cannot say of his own knowledge; never went through the whole of the 4th mile to measure it. The whole work was expensive, and well done so far as done. Saw a large schooner drawing 7 feet and a good-sized steamboat go through. Cross-examined, cannot say the schooner drew 7 feet at the time. General Cyrus Bussey, another witness for plaintiff, was a director and treasurer of the company, negotiated a loan of $200,000 with plaintiff, giving the State bonds as collateral; owing to subsequent depreciation, and inability of the company to meet its obligations, plaintiffs bought in the bonds. This witness testifies at length, but in general terms, as to the amount expended on the work; states that there was a canal to within a short distance of the river which was and is open to trade, and was used by vessels; he does not say of what size or char-
182 acter. An extensive lock-pit was dug near the river, but never finished, nor was the work otherwise. He knows some work was done on the bayou before the first issue of bonds; gives no details as to the work or dimensions; says all the money obtained through the State bonds, and over $100,000 of private capital, was expended on the work. He subsequently says $500,000 was expended on the work, but does not inform us where the money came from, except the $200,000 from plaintiffs and the $100,000 private capital. Although, as we have said, a director and treasurer also from a very early day, he was unable to give any answer to the question how much stock was subscribed and money paid. He says he does not know; that the capital stock was fixed at $2,000,000. He subsequently informs us that the bonds and credit of the State became so depressed, and the company was called on to make good the margins, which it was impossible for it to
183 do, so the bonds were sold to pay the debt already contracted. We are also informed by him and other witnesses that the company bought and built five dredge-boats, at a cost of near or quite $100,000, and two or more der'icks, worth from $3 to 4,000.00 each. Another witness states that $16,000 was expended in expropriating lands. Bussey swears that all this money, and more than a hundred thousand dollars private capital in addition, was expended on the ca-

nal. He does not know much money was expended on the 1st, 2d, 3d, or 4th mile of the canal; that the length of the bayou and canal is sevn miles altogether, inclusive of the lock of the canal at the river; seven miles altogether. The following is a part of his examination:

"Q. Do you know how much work was done on the first mile of that canal? A. No, sir; I have no idea how much. I only know that I went down there on an excursion with some other gentlemen, and saw a dredge-boat working there, before the first bonds were issued.

184 Q. Whereabouts did you go? A. Not far from the lake. Q. You don't know whether it was the first mile or the second mile? A. I should think it was within a mile of the lake. I rode down in a skiff. Q. What capital had this company before the bonds were issued? A. I can't tell you anything about that. Q. Did it have any capital? A. Capital stock of the company was fixed at two millions of dollars. Q. (By the Court.) I ask you, was that capital subscribed and paid up, or any part of it? A. I don't know how much money was received. Q. (By the court.) Tell us how much private capital was expended on the first four miles. A. I couldn't tell you how much capital was expended on the first four miles."

The same witness says he was a director of the canal company from a short time after the first issue of bonds, he cannot state the ex-

185 act time; that considerable sums were spent on the first three miles of the canal, but he don't know how much. He knows there a number of places where the bayou had to be deepened and widened and trees and underbrush cut off to make the canal navigable. He admits that the dredge-boats of the company were purchased partly with money derived from the sale of the bonds; the cost or value of these is shown by him to have been about $100,000; other witnesses place them and the cost of derricks considerably higher. The same witness elsewhere states that more than five hundred thousand dollars were spent on the canal, without the machinery; but he does not inform us from what source the money was obtained, other than the $192,000 from plaintiffs, after deducting commissions and the hundred thousand dollars of private capital previously spoken of by him. He further says that the dredge-boats bought for the canal were brought up here and used in the drainage of the city. Several other witnesses make the same statement, and one says they are still somewhere

186 in the city in some of the canals. He says there was really, and still is, a canal to within a short distance of the river so that vessels of considerable size could come up close to the river; that he saw vessels within a quarter of a mile of the river; that the canal was advertised as open to trade, and there was trade on it. He, however, does not give either the size or number of the vessels, which we are led, from the testimony of other witnesses for the plaintiff, and in the cause, were not either numerous or of the draft contemplated in the act. The testimony of this witness further, we think, sufficiently shows that the company originally expected the work to be done with the money or credit of the State, and that in point of fact, although the capital stock was placed at $2,000,000 *of dollars*, very little, if any, of it was ever paid in. Under this state of facts there might be a very serious question whether there ever was any legal organization of the company under the charter. In answer to the question what

187 caused the enterprise to fail, the same witness says:

"The canal company met with great difficulties in the excavation of the canal in the upper end towards the river. All the work was

prolonged beyond the time of our estimates. Sunken roots and stumps would delay the dredge-boats for days at a time by causing breakages of machinery. The lock-pit was an enormous work, requiring the excavation of a large amount of earth, and in consequence of this great delay the company was carried into a time when the credit of the State was impaired by the frequent revolutions that had taken in political matters, till the loans which the company had effected on its bonds were much greater than their market value. At one time those bonds were down, I think, as low as (25) twenty-five cents on the dollar. The company was called upon to make good the margins, which was an impossible thing for it to do, so the bonds were sold to pay the loans
188 that had been contracted. By this time the Mobile and New Orleans Railroad was constructed, and that, to a great extent, took the place which this canal was intended to fill, and it prevented private capitalists putting up money to complete it, as more than (½) half the capital put up by the State had been consumed, owing to the decline in the value of the bonds."

We think this record discloses another, and, doubtless, the most cogent reason for abandoning the work, i. e., the new privileges and contract obtained by the same company by virtue of the drainage act, to which, from that time until they made a failure in that also, the canal company addressed itself. The next witness for the plaintiff is Riorden, an engineer on one of the dredge-boats employed in excavating the 4th mile of the canal, who says they wer' instructed to dig 11 feet at low water; that at an ordinary stage of water the depth attained was from 12 to 14 feet; that he has no doubt *there* the depth of the 4th mile exceeded ten feet when the State engineer gave his certificate in
189 June, 1870. On cross-examination, however, he says, in answer to the question:

"Q. How do you know that the fourth mile was 10 feet deep all the way through? A. Instructions were to dig eleven feet; I knew depths by water-marks on the dipper-handle of the dredge; I never went through the mile for the purpose of examining the depth; I judge by the general orders and what I heard the men say as they were employed; I cannot, of my own knowledge, say that the fourth mile was ten feet deep at every point. I can't swear of my own knowledge that there was an average depth of ten feet through the whole of the 4th mile."

In reference to a schooner drawing 7 feet, which he had stated in chief he saw going through, he says on cross-examination, "I do not say she was drawing 7 feet at that time." He does say, however, that vessels, the size of which he does not mention, can go through it from the river bank to Mobile, &c., and that he saw the Murty, a good-sized steamboat, going through, and that the work on the bayou and
190 canal was expensive, and, so far as done, well done. This witness states that the canal was only dug 40 feet wide in the 5th, 6th, and 7th mile, which, as well as the 4th, consisted of the part of the canal which was chiefly artificial piles were driven outside the mouth of the bayou and some little dredging done. The piling was intended to protect the mouth of the bayou, and other witnesses say extended out into the lake about 150 feet—one says 400 feet. It would be too tedious to give even the substance of all the testimony; suffice it to say that none of the witnesses give so favorable an account for the plaintiff as those from whom we have quoted. The most minute and circumstantial statement of the character and cost of the work is that of the witness Merrill, who was superintendent of the canal company from the commencement, which he states was on the 5th of April, 1869,

till they left there in 1871 to do the drainage work of the city. He says the only work done on the 1st mile of the canal was dredg-
191 ing off one point about a mile from the mouth of the bayou, which had the requisite width and only its natural depth, but that at the time the bonds were issued, 23d of April, 1869, there was not ten feet depth of water all the way in the bayou. He places the cost of work on the 1st mile at $1,000.00; says it was done in seven days, with one dredge-boat and the five hands on it, without other assistance; that he employed fifteen or twenty negroes in cutting the overhanging branches of the trees along the bayou, and used the dredge in taking stumps from the bayou and clearing the 2d mile; this took ten days and cost about $1,200.00. This was all the work done on the 2d mile before the bonds were issued. The 2d mile had the necessary width and depth; the depth was the natural depth. They began work on the third mile by dredging through a lagoon. They made a cut through the soft mud of the requisite width and depth. The mud was lifted and thrown back into the lagoon; it was so soft it interfered
192 with the work and filled in behind them as fast as the dredge passed; this work occupied two weeks, was done by the hands on the dredge-boat without other assistance, and cost about $2,000.00. The third mile was not ten feet deep all the way when engineer gave his certificate. There was fifty to 75,000.00 expended on the 4th mile. It was a lagoon 200 feet wide; the canal dug through it was 70 feet wide at the top, and less than 40 feet at the bottom; it was not 10 feet deep all the way. They did their best to make a good channel there, but the mud would continue to fill in behind them unless it was piled away in some other place. It should have been taken away and dumped somewhere out of the lagoon. They had a driver on the banks, referring no doubt to the derricks to remove the mud, but this was not till a year afterwards. His statements of cost do not include that of the dredge-boats. They used the bayou to within four miles of the river and dug a canal the remaining distance; small light-draft boats drawing four to five feet, but no more, run up and down the canal. This witness states
193 the cost of excavating the canal where the bayou is not used at $150,000. He says they built other dredge-boats, and had for the entire work six altogether; 4 cost $20,000 each, one $12,000, and one $25,000; all of which were brought away from the canal to the city when they commenced the drainage work. He says there is a bar at the mouth of the bayou, extending about 400 feet into the lake, upon which there was three feet at low water when he came in with his dredge, and there is not more than six to seven feet water in the lake. That it was no use to remove the bar and let vessels in till the canal was completed. It was intended only to let in the dredge-boats, and the plan was to remove the bar after the canal was done. Another witness, Gillespie, fully corroborates the statements of Merrill as to the character and extent of the work as to the first three miles, but says he does not know its value. He commenced work at the same time with Captain Merrill; was employed on the dredge as dipper-tender; continued through the first three miles, and was then sent to
194 Pascagoula, and had no more to do with the work A point was cut off to straighten the bayou, but the water was just as good before as after. Was there all the time the work was going on on the first three miles. They had but one dredge on this part of the work. They were about one week cutting off the point. He and Merrill both state the dredge could have been hired at $15.00 per day. It belonged to Mr. Noyes, and had been used at Pascagoula. Witness had been

working there under Captain Merrill, and came from there with him to work on the canal. When witness left it was claimed that the first three miles was done. Merrill again says there was about three miles of artificial canal cut from near the river in nearly a straight line; that piles were driven about 400 feet out into the lake to protect the entrance, and a cut of twenty feet wide and eight feet deep had been dug outside in the lake; that the average depth of Lake Borgne for navigable purposes changes with the wind; it is from six to nine feet deep in the summer. He says the lock-pit was dug 200 feet long by 150 wide,
195 and 12 feet deep. If it was completed the canal would be useful for small-draft vessels, but not for those of more than four feet draft. The water is lower in winter than summer, owing to the wind being from the north. It was impracticable for boats of ten feet draft to navigate the canal without also dredging the lake. This comprises the most important cotemporaneous testimony. Some years after the work was abandoned, three experts were sent down there to examine and report the condition of the canal and the amount of work done on it. This appointment was made in the mandamus case of the same plaintiffs, to which we have already alluded. It is objected that their report should not have been received by reason of their ex-parte appointment. Under the facts presented in this record we deem it a matter of but little importance whether the report is considered or rejected, as the substantial facts stated in it also appear from the oral testimony of one of the experts given on the trial, and by a diagram of the
196 survey sworn to and filed in the record. The plaintiffs introduced two witnesses who accompanied the experts, both of whom corroborate their statement that they passed through the canal from the lock-pit to the lake, occupied considerable time in doing so, and made frequent soundings and measurements. The substance of the testimony of the two witnesses referred to is that there was evidence of considerable work having been done, and that they were surprised to find the canal in so good condition so long after the work had been abandoned; and that the examination was made almost entirely from the boat. This was in December, when the water was lower than in summer, and than it had previously been. The experts were Webster, Wood, and Heath, and they were also accompanied, as Webster testifies, by Rowland, a surveyor, whom they took with them to aid in measurements and in making an accurate examination. Webster states that they made an accurate and thorough examination, made some six hundred soundings, and con-
197 sumed an entire day in doing so; that the experts were unanimous in their report. He says their attention was called to the cut in the first mile, but they failed to see it. That the first mile from the lake was over seventy feet wide and ten feet deep; saw no indications of dirt being thrown on the bank in the first mile. They found a cut in the 2d mile 100 yards long, with a channel of six feet depth on each side; nothing else in the 2d mile. From the 2d to the 3d mile a point part of the way through the lagoon the soundings were very irregular; eight feet the greatest and three feet the least. They discovered no evidence of work having been done on the third mile. In the 4th mile the soundings ranged from five to nine feet, averaging a little over six feet; the width of the 4th mile he believed to be over 70 feet; saw no evidence of work on the 4th mile. About $\frac{1}{8}$ of a mile from the end of the 4th and in the 5th mile dredging had been done for about 250
198 yards; about $\frac{3}{8}$*ths* of a mile further on they came to a canal which was about a mile long, in the 5th mile. The width of the canal from the 4 to 4½ mile point is about 70 feet. The bayou has an average

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200 to the 4th mile from Lake Borgne. The bonds sought to be funded by plaintiff include No. (1) one, not registered as required by the act, and Nos. 362 to 395, both inclusive, and No. 430, being 35 bonds judicially admitted by the plaintiff to have been issued with reference to the 4th mile from Lake Borgne. In regard to these it will not be controverted that it is clear from the evidence, if we go behind the engineer's certificate, as we think the funding bill and amendments not only permits but requires us to do, as before said, in this peculiar statutory action by which we are required to find and adjudge the existence of certain facts as a prerequisite to funding—it is, we say, clear that all the bonds issued for the 4th mile were issued not in accordance with but in violation of law. The same may be said of bond No. (1) one, in regard to which the express provision of the act was disregarded and not obeyed, which as much required the registry of the bonds on the books of the treasurer of the State as that they be signed by the governor, or dated, or made payable in particular amounts or at a stated time, or any other form or fact required to make
201 them perfect and complete bonds of the State (see section 2d of act 116 of 1869). It is also clear, and not controverted by any party to this proceeding, and fully shown by the evidence of the plaintiff company, that there were but two issues of bonds: those for the first three miles indiscriminately, by virtue of the engineer's certificate of April 23d, 1869, which itself covers the first three miles from Lake Borgne, without discrimination or distinction also; and the second issue, which was for the 4th mile, by virtue of the engineers' certificate of June 16th, 1870. By recurring to the terms of the act already recited and in evidence, it will be perceived that the law contemplated and required, and it was the evident intent of the legislature, that the

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certificate of the engineer, and the issue of bonds based upon it, should be given and made for each successive mile of the contemplated work as it should be completed, according to the requirements of the act. That it was a proper and necessary safeguard, and a wise provision and precaution, is made abundantly manifest by the facts developed in this record, even by the plaintiffs themselves, and with reference to no other testimony than that of the engineer, upon which we have already commented. How much more, then, if we consider the testimony of all the witnesses, as it is presented in the record of this case. Had this provision of the act, which looked to successive short and careful surveys and accurate and minute measurements, and to equally cautious and successive issues of bonds, been obeyed, not only might the State but the plaintiffs have been spared the trouble of this litigation, and the possibility of so heavy loss or burthen as may be entailed upon the one or the other. We have seen that the best informed cotemporaneous witnesses, as well as those witnesses to a later period, directly contradict the certificate of the engineer as to the first three miles; that his own testimony supports it very unsatisfactorily; and that his certificate as to the 4th mile could not have been correct unless it alone is to be believed against and above the overwhelming weight of other testimony. The inevitable conclusion is, then, that the certificates, as given, were not correct, and ought not to have been given; and, if so, that the bonds based upon them should not have been issued, and were not issued in accordance with the terms and conditions and in the manner and amount fixed in the statute. Who can say in regard to three hundred and sixty bonds issued at the same time and based upon one common certificate what part of the bonds were issued for the first mile, and what part for the second, and what part for the third mile? There is no evidence in this record to enable us to make the distinction. The bonds themselves do not enable us to do so, and the officials who issued them do not seem to have made it. What greater right have the plaintiffs to claim that the 250 bonds now sought to be funded, or any part of them, should be preferred to the remaining 110 of the same issue, based upon the same certificate, held by others. The evidence is direct and positive that the 360 bonds for the first three miles were all issued at the same time and put upon the market at the same time, while the old and well-recognised maxim of the law, "falsus in uno falsus in omnibus," may as well be opposed to the engineer's certificates as to any other formor class of evidence. Again, the evidence is that the act authorizing the issuance of bonds to the canal company was approved March 18th, 1869. The work was begun on the 5th of April, 1869. On the 19th of April the governor made requisition for an engineer. He was detailed to make the survey on the 20th of April, and made it the same day, and on the 23d of the same month and year, April, 1869, the work had progressed so far, according to the engineer's certificate, that the company was entitled to $860,000 of State bonds under the act. The rapidity with which this desirable end was thus attained at one leap, without even the formality of stopping at any intermediate point or sum, is the best commentary upon the manner and facility with which so large burthens were in those evil days sought to be imposed upon this State and people without adequate or any consideration; and whatever may be the current of decisions and the weight of authority as to the right of the State to tax its people for works of internal improvement prosecuted and owned by private corporations, who will

say that under the facts, as in the present instance, that power was in any proper sense exercised for the public benefit, or that the public have been benefitted. Again, as was said in the Lord Cecil case (29th A.), there is no evidence in this record that the mortgage in favor of the State required by the 3d section of act 116 of 1869 was ever executed or recorded as required by our code and constitution; and the security thus required was a most important consideration to the State, and its only security for the payment by the company of the amount of the bonds and interest, and the performance of its obligations under the contract and the law embodying it. Of all of these requirements, and of all the provisions of the act, the plaintiffs were affected with notice when they took the bonds, as the act was printed upon them.

The law required the indorsement of the bonds by the president
206 and treasurer of the company for their transfer. If there was no legal organization there was neither president or treasurer, nor, if so, was there any judicial person, any corporate entity, in whose favor a legal issue of bonds under act 116 could be made. Whatever may be the real facts, so far as they appear in this record, they would indicate that the amount of stock required by the charter was never subscribed or payment made on it. No attempt has been made by the plaintiffs to show such subscription, or how or when an organization was effected. We know of no law, and have been referred to none, which would authorize or permit the organization of a joint-stock company before the amount of capital stock fixed in the charter was subscribed, unless, as is not the case with the Mississippi and Mexican Gulf Ship Canal Company, the charter authorizes an organization upon the subscription or taking of some minimum or smaller sum. The

plaintiff's counsel has referred to an obiter dictum of this court
207 in the mandamus case by the same plaintiff in relation to the provision in the act for the redemption of the bonds issued under it, which by the constitution, article III, is required to be made at the same time the issue or debt is authorized, and which shall be irrepealable till the principal and interest are fully paid. The provision made by act 116 of 1869 on this subject was certainly loose, and has proved to be very unsatisfactory and insufficient. We do not, however, consider it necessary to decide in the present case whether it was or not a sufficient compliance with article III of the constitution. The mandamus case, as is properly remarked by plaintiff's counsel, went off on a question of procedure, and the point was not there ruled. On the whole case we do not think that the plaintiff has established, as required by act No. 11 of 1875, amending the funding bill (and as it was incumbent upon it to do), that the bonds in question are legal and valid obligations of the State; that they were issued in strict conformity to
208 law, and not in violation of the constitution of this State or of the United States, and for a valid consideration. So, also, thought the judge a quo, who gave judgment for the defendants, with costs.

That judgment was correct, and is affirmed.

Petition for rehearing.—Filed 30 October, 1878.

Supreme court of Louisiana.

THE N. Y. GUARANTY & INDEMNITY COMPANY *vs.* THE BOARD OF LIQUIDATION. } No. 6939.

To the honorable the supreme court of Louisiana:

The Petition of the plaintiff herein respectfully shows that there are errors to its prejudice in the opinion and decree of this honorable court lately rendered therein, and it prays for a rehearing according to law; and,

First. Petitioner avers and shows that the act No. 11 of 1875, extra session of the legislature of Louisiana, as drawn in question, set forth, relied on, and construed in the said opinion and decree of
209 your honors, is, as thus construed, unconstitutional, null, and void, being in conflict with article first, section tenth, of the Constitution of the United States, which provides that no State shall pass any law impairing the obligation of contracts.

The suit at bar is instituted under the act No. 3 of 1874, commonly called the funding bill. The defendant is created by that act, and by that act alone is this action authorized.

By that act No. 55 of 1874, to which the attention of your honors is now specially called, all remedies of this petitioner and other bondholders are taken away, except those which *which* existed through the act No. 3, and the action thus given to compel a funding in new "consolidated bonds."

Petitioner was thus left with one practical and present remedy only —to fund its bonds by action or suit under said act No. 3 of 1874.

It had a right to accept that situation, and it did; provided al-
210 ways that its bonds should be so funded. It brought its suit under that act.

It is met in the pleadings with a general denial only. In the argument and in the opinion of the court it is met with the act No. 11 of 1875, extra session, which, as construed by your honors, makes an illegal assault on the bonds held by petitioner, impairs their obligation, takes away the rights of petitioner, which had existed for years as a bona-fide holder of them, relieves the State of its own judicial admissions in the case of State vs. Graham, and changes rules of evidence to the prejudice of plaintiff.

The bonds acquired by petitioner in 1871, the law of 1869, under which they were issued, and the several provisions of that law, constitute contracts in favor of petitioner, which could not be lawfully impaired by the State. If it be said that the acts Nos. 3 and 55 of 1874, above referred to, in view of which this suit was brought, also impair the obligations of said contracts, the reply is evident that petitioner may waive its objections to such impairment, and submit to the funding
211 régime; and petitioner has done this on condition that its bonds should be funded. But petitioner is not obliged to waive any other right. No earthly power can force it lawfully to any further concession.

Petitioner is willing to accept the pittance of 60 cents offered by the act No. 3 of 1874, and to ask for it by the suit provided in that act; but when your honors declare that even that pittance shall be refused because the act No. 11 of 1875, in the opinion of your honors, takes it

away, then the act No. 11 of 1875 takes away the last shred of remedy and right—strikes the coup de grace at the contracts of petitioner; and petitioner has a right to invoke and does invoke the Constitution of the United States, as cited above, with all the results implied in such a pleading.

Reference is here made to the late case of Hall vs. Decuir (The Reporter, vol. 6, p. 420), where the Supreme Court of the U. S. has reversed the decree of the supreme court of Louisiana, because the statute there in question, as construed by the State court, conflicted with the
212 Constitution of the United States; and also to the cases of Gelpke vs. Dubuque, 1 Wall., 175, and Thompson vs. Lee Co., 3 Wall., 327.

Second. Petitioner submits that your honors have erred in ruling that testimony might be admitted to vary, contradict, or affect the certificates of the chief State engineer, upon which the bonds were issued. By the act of 1869, authorizing the bonds, they were to be issued on these certificates, and for the payment of the principal and interest of the bonds so issued "the faith of the State is unconditionally pleaded to the holder." The bonds which are in evidence recite that they were issued according to the act, and the act is printed on their reverse. The plaintiff becoming holder in 1871, took them with the solemn assertions made by the proper officers who signed the bonds and the certificates on which those officers acted. Moreover, there is in the pleadings no allegation of either error or fraud. By the law, as it existed in 1869 and 1871, the certificates were the evidence, and the only evidence
213 proper in the premises. (Orleans Co. vs. Allard, 6 La., 491; Town of Coleman vs. Eaves, 2d Otta, 487.)

This dilemma is presented: Either the act No. 11 of 1875 is null and void as set forth above, because it impairs the obligations of plaintiff's contract, acquired under the act 116 of 1869, including the right to safely rely on said certificates as conclusive, or else it does not take away that right, and the certificates were and are conclusive.

Third. It is submitted that your honors have erred in ruling that the judicial admissions made in the case of State vs. Graham, 23 Ann., 402, were not conclusive as to the validity of the bonds held by plaintiff. In that case the State intervened in her full capacity. Her right to do so was questioned, but it was sustained. (See opinion.) She was represented by the attorney-general. To defeat the relator in that cause—to save herself a large sum of money—she set up that her debt had reached a certain point, and that among its items were the very bonds in question in the case at bar. And in the opinion in her
214 favor, by this court, these bonds are especially referred to as a part of the valid existing debt of the State. This opinion was delivered and published to the world in the early part of 1871, before the plaintiff acquired the bonds, and formed an additional element in the bona fides of its acquisition. Now it is submitted that the State and its officers can never be heard in any court to say that the bonds are not valid. Having defeated Solomon & Simpson, by setting up these bonds as valid, she cannot now defeat the holders by saying they are invalid. On no principle of law, logic, or moral science can she be permitted to affirm their validity in court for her own purposes in 1871 and then deny it in 1878.

(State vs. Taylor, 28 A., 462.)

The plaintiffs who purchased after the decision in State vs. Graham had a vested right in the estoppel thus created which the legislature

cannot take away. We submit that act No. 11 of 1875 does not take it away. But if it attempts to it is itself void.

215 Fourth. It is submitted that your honors have erred in holding that under the act 116 of 1869 it was necessary that each mile of the work should be measured by the State engineer at a different time, and a separate certificate given for each mile, and a separate issue of bonds made for each mile as certified. The statute does not intend or convey any such meaning. The phrase "each certificate being given on the completion of each of said miles" is a provision in favor of the company, not a precaution in favor of the State. It was to enable *to* company to demand an issue of bonds for each mile as completed, and to prevent any State officer from saying, "Yes, you are entitled to so many bonds for each mile, but you must wait till they are all done," that the company chose to wait till three miles were done, and then demand the measurement of three miles continuously, and the issue of bonds for three miles continuously was no more illegal or irregular than for a landlord, having a right to collect his rent month by month, to wait and collect three instalments in one,

216 nor, if your honors will permit the illustration, for a justice of this court to wait nine months and then collect three-quarters salary at one time. The salaries of the judges are directed by law to be paid quarterly, on their own warrants. It would be a violation of law for the financial officers of the State to refuse to pay them in such quarterly instalments, but it would be no violation of law for a judge to wait a year, if he chose, and collect four quarters at once. A party in whose favor a right is created may waive it. There is no principle of law or engineering or finance by which the measurement of a canal and the issue of bonds would be any better or worse whether three miles were measured continuously in April, or from time to time in April, May, and June. State officers are presumed to do their duty on one day as well as on another.

The attention of your honors is especially called to the fact that this point was not made against petitioner by the defendant nor its

217 eminent counsel. It has never been argued in any way. We have never been heard in regard to it in any way. And this fact alone would seem to entitle petitioner to a rehearing. For the right to be heard by counsel is a fundamental and sacred right.

Fifth. It is submitted that your honors have erred in considering and giving force to a report of experts, so called, and to the testimony of Webster, which had been used on a former trial, and which was received in the lower court subject to the same objections made to all testimony offered to contradict the certificates of the State engineer.

The visit of Webster and his companions and their report were made in December, 1875. Nearly seven years had elapsed since the work was done in 1869, on which the bulk of the bonds were issued. Over five years and five months had elapsed since the completion of the fourth mile and the issue of the balance of the bonds. The canal ran through a swamp, a trembling prairie, and opened into a great tidal lake,

218 subject to terrific southeasterly and northeasterly gales. The same gigantic powers of tide and tornado which overwhelmed Proctorville some years ago, and which in a similar situation often overflow the rear of New Orleans, had been operating on this canal for nearly seven years. The diversion of trade, the financial pressure, the death of the chief projector of the canal, the transfer of the dredge-boats to New Orleans for drainage purposes, under the authority of the State herself, by act 30 of 1871, had delayed the completion of the canal

and diminished, doubtless, the care taken of it by the company. Webster himself, after stating that there was a sufficient width for the first four miles, and in reply to a question by the defense, which sought to create an inference that a want of proper depth had always existed, testified:

"Q. Did that indicate that the bayou had filled up since the certificates were given in 1869, or was it wanting in depth originally?
219 A. We took the water as we found it. Q. Do you know whether any sediment has fallen into the bayou? A. My opinion is that from the sides and from the canal a sediment could go into the bayou. I am told there is a strong current up and down the bayou, made by the wind and the tide, which could carry it right up."

We think it plain that bonds issued in 1869 and 1870 cannot be affected by the condition of the work in 1875, and that the specific objections set forth in petitioner's original brief, pp. 40, 49, ought to have been maintained; and they are again submitted to the attention of the court.

Sixth. It is submitted that your honors have erred in holding that the plaintiff ought to have proved that the mortgage created in favor of the State by act 116 of 1869 had been recorded. We submit that there is no law requiring any mortgagee to have his mortgage recorded.
He may do it or not, as he chooses, without affecting the validity
220 of the principal obligation. The State may or may not have lost its mortgage in this case, but the bonds are not affected. The statute does not declare that the bonds shall be issued and thrown on market only after such recording; and neither the statute nor any other law required the purchaser to find out if a registry had been made.

Seventh. It is submitted that your honors erred in not conceding to the plaintiff the well-settled rights of the bona-fide holder of bonds issued by officers having power to issue them.

The rule is universal that where the power to make the obligation exists, as in this case, and the law under which the bonds are issued authorizes the officers whose names are affixed to execute them, as in this case, and the bonds purport on their face, as these do, to have been issued in pursuance of the statute, and to pledge the faith of the
State unconditionally under such statute for their payment to
221 the holder, the production of such bond by a bona-fide holder establishes by conclusive presumptive evidence that "all precedent requirements" to such issue have been complied with.

(Knox Co. vs. Aspinwall, 21 Howard, 545; Meyer vs. Muscatine, 1 Wall., 393; Mercer Co. vs. Heckett, 1 Wall., 93; Van Hostrup vs. Madison, 1 Wall., 297; Thompson vs. Lee Co., 3 Wall., 27; Supervisors vs. Schenck, 5 Wall., 784; Aurora vs. West, 7 Wall., 82; Beloit vs. Morgan, 7 Wall., 619; Pendleton Co. vs. Arny, 13 Wall., 297; Mayor vs. Lord, 9 Wall., 414; Bissell vs. Jeffersonville, 24 Howard, 287; Rogers vs. Burlington, 3 Wall., 654; Lexington vs. Butler, 14 Wall., 282; Grand Chute vs. Winegar, 15 Wall., 355; Illinois vs. Delafield, 8 Paige (N. Y.), 527; Town vs. Eaves, 2 Otto, 487.)

Eighth. It is submitted that your honors erred in stating that no branch of the government, not even the legislature, could ratify these bonds. In support of this proposition article 1, 10, of the Constitution is quoted, which provides that "no retroactive law shall
be passed." We confidently submit that the various legislative
222 recognitions of these bonds since 1869 are not "retroactive laws," and we refer to the exposition of this same article given but

lately by the Supreme Court of the United States, in the case of the Carrollton bonds, held to be ratified by a subsequent statute. As no constitutional question can be considered of slight importance, we beg to refer to this case. (Gaslight Co. vs. Clark, The Reporter, vol. 6, p. 259.) It will be found that as to the phrase in question, the views of the Supreme Court of the United States are directly opposed to those of your honors.

Ninth. It is submitted as matter of fact that your honors have erred in holding that the four miles of improved bayou and canal from Lake Borgne towards the river were not of proper width and depth when the bonds were issued. The certificate of Thompson and his testimony taken on a former trial, and the testimony of Adley and Riordan, seem to us to establish the contrary fully that there was a proper depth. The only contemporaneous witness for the defence on this point is
223 Merrill, and he is very weak. He does not profess to have ever made a measurement of any kind, and his theory is, not that the work was not dug deep enough (for the evidence is overwhelming that it was), but that in some spots earth slipped back. We submit that this sort of loose statement should not overcome the certificates and the testimony of plaintiff.

The importance of the question in this case transcend its limits. If plaintiff is to be defeated who will ever be so insane as to evidence any more money to a work of public improvement in this State? At the last term in New Orleans your honors declared valid an act to give State aid to the N. O. Pacific Railway, bonds to be issued to the road as each section of ten miles shall be certified complete by a State engineer or other engineer detailed by the governor. If your honors' opinion is to stand as the law of this State such bonds can never be negotiated. What intelligent man could buy them for himself, or for the widow, the orphan, the savings bank, or any other trust fund?
224 In vain would the State engineer certify, in vain would the State officers under their hand and seals declare that they had been issued according to the statute. The reply would only be, "We live in London, New York, or Paris; we cannot go and measure your road; if we did we might make an error of a yard or a furlong; your engineer may have made an error, he may die; ten years hence some one else may have control of your State, and then it will be declared that there was an error of a yard or a furlong; there will be litigation, lawyers' fees, the attorney-general will cite the case of the N. Y. Guaranty & Indemnity Company, and we shall lose every cent we have advanced."

The premises considered, petitioner prays for a rehearing and for general relief.

KENNARD, HOWE & PRENTISS,
EDWARD PHILLIPS,
Att'ys for Plaintiff.

Oct. 22nd, 1878.
(Signed) KENNARD, HOWE & PRENTISS.

225 *Rehearing refused.—Extract from the minutes, Monday, January 13, 1879.*

The court was duly opened pursuant to adjournment. Present, their honors Thomas C. Manning, chief justice, and Robert H. Marr, Alcibiade De Blanc, William B. Spencer, Edward D. White, associate justices.

His honor the chief justice pronounced the judgment and decree of the court in the following case:

N. Y. GUARANTY & INDEMNITY CO.
vs.
BOARD OF LIQUIDATION.
No. 6939.

It is ordered that the rehearing applied for in this case is refused.

Petition for writ of error.—Filed 17th February, 1879.

Supreme court of Louisiana.

THE NEW YORK GUARANTY AND INDEMNITY Company
vs.
THE BOARD OF LIQUIDATION.
No. 6939.

To the Hon. T. C. Manning, chief justice of the supreme court of Louisiana:

The petition of the New York Guaranty and Indemnity Com-
226 pany, the plaintiff in this cause, respectfully shews:

That in the record and proceedings, and also in the rendition of the final judgment in this cause by the honorable the supreme court of Louisiana, there was drawn in question the validity of a statute of said State of Louisiana, namely, the act No. 11 of 1875, extra session, on the ground of its being repugnant to the Constitution of the United States, and the decision of the supreme court of Louisiana was in favor of the validity of said statute.

And there was also drawn in question the construction of a clause of the Constitution of the United States, to wit, article first, section ten, of the said Constitution, and the decision was against the right, title, privilege, and exemption specially set up and claimed under such clause of the Constitution by the plaintiff herein.

That the judgment of the said supreme court of Louisiana is
227 now final, and said court is the highest court of law and equity of the said State in which a decision in this cause could be had.

That, as plaintiff is advised, informed, and believes, there is error in the final judgment against it as aforesaid, and that plaintiff has a right and desires to have the said cause removed by writ of error to the Supreme Court of the United States.

Wherefore petitioner prays that the writ of error herewith presented may be allowed, and the bond herewith presented approved, and a citation to defendant duly signed in accordance with the acts of Congress, and for all general relief.

(Signed) ED. PHILLIPS,
(") KENNARD, HOWE & PRENTISS,
Att'ys for Plaintiff.

Let a writ of error be allowed as within prayed for and according to law, returnable to the Supreme Court of the United States on the second Monday of October, A. D. 1879.

228 *Writ of error.—Filed 17th February*, 1879.

Supreme court of Louisiana.

THE N. Y. GUARANTY & INDEMNITY CO.
vs.
THE BOARD OF LIQUIDATION.
No. 6939.

Copy of a writ of error lodged in the clerk's office of the supreme

court of Louisiana, in pursuance of the statute in such cases made and provided, this 17th day of February, one thousand eight hundred and seventy-nine.

(Signed) KENNARD, HOWE & PRENTISS,
(") ED. PHILLIPS,
Attorneys of Plaintiff in Error.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the supreme court of Louisiana, greeting:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the said circuit court before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between the
229 New York Guaranty & Indemnity Company, plaintiff, and the Board of Liquidation, defendant, wherein was drawn in question the validity of a statute of said State of Louisiana, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such its validity, and wherein was drawn in question the construction of a clause of the Constitution of the United States, and the decision was against the right, privilege, and exemption specially set up or claimed under such clause of the Constitution, a manifest error hath happened, to the great damage of the said plaintiff, the New York Guaranty & Indemnity Company, as by its complaint appears:

We being willing that error if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme
230 Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court of the United States, this 15th day of February, in the year of our Lord one thousand eight hundred and seventy-nine.

[SEAL.] (Signed) F. A. WOOLFLEY,
Clerk of the United States Circuit Court for the District of Louisiana.

Bond for writ of error.—Filed 17th February, 1879.

Supreme court of Louisiana.

THE N. Y. GAR. & IN. CO. *vs.* BOARD OF LIQ'N. } No. 6939.

Know all men by these presents that we, the New York Guar-
231 anty & Indemnity Company as principal, and Edward Phillips, as surety, are held and firmly bound unto the Board of Liquidation (of Louisiana) in the full and just sum of five hundred dollars, to

be paid to the said obligee, its successors, certain attorney, executors, administrators, or assigns, to which payment well and truly to be made, we bind ourselves, our successors, heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals, and dated this day of February, in the year of our Lord one thousand eight hundred and seventy-nine.

Whereas lately in the supreme court of Louisiana, in a suit depending in said court, wherein the New York Guaranty and Indemnity Company is plaintiff and said obligee defendant, judgment was rendered against the said plaintiff, and the said plaintiff having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Board of Liquidation citing and admonishing

232 it to be and appear at a Supreme Court of the United States to be holden at Washington the 2d Monday of October next:

Now, the condition of the above obligation is such that if the said New York Guaranty & Indemnity Company shall prosecute its writ to effect, and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

(Signed) THE NEW YORK GUAR. & IND. CO. OF NEW YORK, [L. S.]
Per EDWD. PHILLIPS, *Their Att'y.* [L. S.]
(Signed) EDW'D PHILLIPS. [L. S.]

Sealed and delivered in the presence of—
(Signed) W. W. HOWE.

Approved, New Orleans, Feb'y 15, 1879.
(Signed) TH. C. MANNING,
Chief Justice Supreme Court of Louisiana.

Agreement of counsel.—Filed 27th June, 1879.

N. Y. GUARANTY & INDEMNITY CO. *vs.* THE BOARD OF LIQUIDATION. } No. 6939.

233 In preparing the transcript for the Supreme Court of the United States, on writ of error, it is agreed that one of the bonds sued on may be annexed in original as a sample of the whole; that the case of State ex rel. Solomon & Simpson vs. Graham may be referred to as reported in 23 La. Ann., pp. 402–408, and that the printed charters annexed to the record in the supreme court of Louisiana may be annexed and sent up in original. The journal of the house of 1870 may be omitted, either party to have the right to carry up in the original and as part of the transcript any documents that may have been omitted therefrom, but which properly belongs to the record.

(Signed) H. N. OGDEN, *Att'y Gen'l.*
(") KENNARD, HOWE & PRENTISS.

Clerk's certificate.

UNITED STATES OF AMERICA:

Supreme court of the State of Louisiana.

I, Alfred Roman, clerk of the supreme court of the State of

234 Louisiana, holding sessions at the city of New Orleans, do hereby

certify that the foregoing two hundred and thirty-three (233) pages contain a true copy of the transcript of the proceedings had in the fifth district court, for the parish of Orleans, in a certain suit wherein the New York Guaranty and Indemnity Company was plaintiff and the Board of Liquidation was defendant; and also of all the proceedings had in this supreme court on the appeal taken by said plaintiff, which appeal is now on the files thereof under No. 6939.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at the city of New Orleans, this seventeenth day of July, anno Domini 1879, and in the one hundred and fourth year of the Independence of the United States of America.

[SEAL.] ALF'D ROMAN, *Clerk.*

235 UNITED STATES OF AMERICA,
State of Louisiana:

Supreme court of the State of Louisiana.

I, Thomas Courtland Manning, chief justice of the supreme court of the State of Louisiana, do hereby certify that Alfred Roman is clerk of the supreme court of the State of Louisiana, holding sessions at the city of New Orleans; that the signature of Alfred Roman to the within certificate is in the proper handwriting of him, the said clerk; that said certificate is in due form of law, and that full faith and credit are due to all of his official acts as such.

In testimony whereof I have hereunto set my hand and seal, at the city of New Orleans, this seventeenth day of July, A. D. 1879.

[SEAL.] TH. C. MANNING,
Chief Justice of the Supreme Court of the State of Louisiana.

236 Supreme court of Louisiana.

THE NEW YORK GUARANTY AND INDEMNITY Company *vs.* THE BOARD OF LIQUIDATION. } No. 6939.

To the Hon. T. C. Manning, chief justice of the supreme court of Louisiana:

The petition of the New York Guaranty & Indemnity Company, the plaintiff in this cause, respectfully shows:

That in the record and proceedings, and also in the rendition of the final judgment in this cause by the honorable the supreme court of Louisiana, there was drawn in question the validity of a statute
237 of said State of Louisiana, namely, the act No. 11 of 1875, extra session, on the ground of its being repugnant to the Constitution of the United States, and the decision of the supreme court of Louisiana was in favor of the validity of said statute.

And there was also drawn in question the construction of a clause of the Constitution of the United States, to wit, article first, section ten, of the said Constitution, and the decision was against the right, title, privilege, and exemption specially set up and claimed under such clause of the Constitution by the plaintiff herein.

That the judgment of the said supreme court of Louisiana
238 is now final, and said court is the highest court of law and equity of the said State in which a decision in this cause could be had.

That, as plaintiff is advised, informed, and believes, there is error in the final judgment against it as aforesaid, and that plaintiff has a right and desires to have the said cause removed by writ of error to the Supreme Court of the United States.

Wherefore petitioner prays that that the writ of error herewith presented may be allowed, and the bond herewith presented approved, and a citation to defendant duly signed in accordance with the acts of Congress, and for all general relief.

ED. PHILLIPS,
KENNARD, HOWE & PRENTISS,
Att'ys for Plaintiff.

239 Let a writ of error be allowed as within prayed for and according to law, returnable to the Supreme Court of the U. S. on the second Monday of October, A. D. 1879.

(Indorsed:) 6939. Petition. Filed Feb'y 17th, 1879. Frank Wall, d'y. cl'k.

240 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the supreme court of Louisiana, greeting:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the said court before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between the New York Guaranty & Indemnity Company, plaintiff, and the Board of Liquidation, defendant, wherein was drawn in question the validity of a statute of said State of Louisiana, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such its validity, and wherein was drawn in question the construction of a clause of the Constitution of the United States, and the decision was against the title, right, privilege, and exemption specially set up or claimed under such clause of the Constitution, a manifest error hath happened, to the great damage of the said plaintiff, the New York Guaranty and Indemnity Company, as by its complaint appears:

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court of the United States, this 15th day of February, in the year of our Lord one thousand eight hundred and seventy-nine.

[SEAL.] F. A. WOOLFLEY,
Clerk of the United States Circuit Court for the District of Louisiana.

certify that the foregoing two hundred and thirty-three (233) pages contain a true copy of the transcript of the proceedings had in the fifth district court, for the parish of Orleans, in a certain suit wherein the New York Guaranty and Indemnity Company was plaintiff and the Board of Liquidation was defendant; and also of all the proceedings had in this supreme court on the appeal taken by said plaintiff, which appeal is now on the files thereof under No. 6939.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at the city of New Orleans, this seventeenth day of July, anno Domini 1879, and in the one hundred and fourth year of the Independence of the United States of America.

[SEAL.] ALF'D ROMAN, *Clerk.*

235 UNITED STATES OF AMERICA,
State of Louisiana:

Supreme court of the State of Louisiana.

I, Thomas Courtland Manning, chief justice of the supreme court of the State of Louisiana, do hereby certify that Alfred Roman is clerk of the supreme court of the State of Louisiana, holding sessions at the city of New Orleans; that the signature of Alfred Roman to the within certificate is in the proper handwriting of him, the said clerk; that said certificate is in due form of law, and that full faith and credit are due to all of his official acts as such.

In testimony whereof I have hereunto set my hand and seal, at the city of New Orleans, this seventeenth day of July, A. D. 1879.

[SEAL.] TH. C. MANNING,
Chief Justice of the Supreme Court of the State of Louisiana.

236 Supreme court of Louisiana.

THE NEW YORK GUARANTY AND INDEMNITY Company *vs.* THE BOARD OF LIQUIDATION. } No. 6939.

To the Hon. T. C. Manning, chief justice of the supreme court of Louisiana:

The petition of the New York Guaranty & Indemnity Company, the plaintiff in this cause, respectfully shows:

That in the record and proceedings, and also in the rendition of the final judgment in this cause by the honorable the supreme court of
237 Louisiana, there was drawn in question the validity of a statute of said State of Louisiana, namely, the act No. 11 of 1875, extra session, on the ground of its being repugnant to the Constitution of the United States, and the decision of the supreme court of Louisiana was in favor of the validity of said statute.

And there was also drawn in question the construction of a clause of the Constitution of the United States, to wit, article first, section ten, of the said Constitution, and the decision was against the right, title, privilege, and exemption specially set up and claimed under such clause of the Constitution by the plaintiff herein.

That the judgment of the said supreme court of Louisiana
238 is now final, and said court is the highest court of law and equity of the said State in which a decision in this cause could be had.

That, as plaintiff is advised, informed, and believes, there is error in the final judgment against it as aforesaid, and that plaintiff has a right and desires to have the said cause removed by writ of error to the Supreme Court of the United States.

Wherefore petitioner prays that that the writ of error herewith presented may be allowed, and the bond herewith presented approved, and a citation to defendant duly signed in accordance with the acts of Congress, and for all general relief.

ED. PHILLIPS,
KENNARD, HOWE & PRENTISS,
Att'ys for Plaintiff.

239 Let a writ of error be allowed as within prayed for and according to law, returnable to the Supreme Court of the U. S. on the second Monday of October, A. D. 1879.

(Indorsed:) 6939. Petition. Filed Feb'y 17th, 1879. Frank Wall, d'y. cl'k.

240 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the supreme court of Louisiana, greeting:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the said court before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between the New York Guaranty & Indemnity Company, plaintiff, and the Board of Liquidation, defendant, wherein was drawn in question the validity of a statute of said State of Louisiana, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such its validity, and wherein was drawn in question the construction of a clause of the Constitution of the United States, and the decision was against the title, right, privilege, and exemption specially set up or claimed under such clause of the Constitution, a manifest error hath happened, to the great damage of the said plaintiff, the New York Guaranty and Indemnity Company, as by its complaint appears:

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court of the United States, this 15th day of February, in the year of our Lord one thousand eight hundred and seventy-nine.

[SEAL.] F. A. WOOLFLEY,
Clerk of the United States Circuit Court for the District of Louisiana.

(Indorsed:) No. 6939. Supreme court La. United States circuit court. No. . versus . Writ of error. Filed Feb'y 17th, 1879. Frank Wall, d'y cl'k.
This writ allowed.
New Orleans, Feb'y 15, 1879.

TH. C. MANNING,
Chief Justice Supreme Court of La.

241 THE UNITED STATES OF AMERICA,
Supreme Court Court *of Louisiana:*

The President of the United States to the Board of Liquidation, through Gov. Francis T. Nicholls, its president, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at the city of Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Louisiana, wherein the New York Guaranty and Indemnity Company is plaintiff and the Board of Liquidation is defendant, to show cause, if any there be, why the judgment rendered against the said New York Guaranty & Indemnity Company as in said writ of error mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 15 day of February, in the year of our Lord one thousand eight hundred and seventy-nine.

[SEAL.] TH. C. MANNING,
Chief Justice of La.

242 *Marshal's return.*

STATE OF LOUISIANA,
Parish of Orleans:

George M. Barnett, being duly sworn, says that he is a deputy sheriff of the supreme court of Louisiana for this parish, and that on the 20th day of February, A. D. 1879, at the city of New Orleans, he served the within citation on the Board of Liquidation, defendant therein, by delivering a duplicate original thereof to Governor Francis T. Nicholls, president of said board, in person, at his office at the state-house.

GEORGE M. BARNETT,
Deputy Sh'r'ff.

Sworn to & subscribed before me this 20th Feb'y, 1879.
[SEAL.] FRANK WALL,
D'y Clerk.

(Indorsed:) Supreme court of Louisiana. No. . R. vs. . Citation. Supreme court of La. Filed Feb'y 20, 1879. Frank Wall, d'y clerk.

(Indorsement on cover:) No. 233. The New York Guaranty and Indemnity Company, plaintiff in error, vs. The Board of Liquidation of the State of Louisiana. Louisiana supreme court. Filed 21st August, 1879.

SUPREME COURT U.S.
J. A. McKENNEY, Clerk.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1881.

No. 233.

THE NEW YORK GUARANTY AND INDEMNITY COMPANY,
Plaintiff in Error,

vs.

THE BOARD OF LIQUIDATION.

BRIEF FOR PLAINTIFF IN ERROR.

WILLIAM WIRT HOWE,
JOHN H. KENNARD,
WILLIAM ALLEN BUTLER,
Of Counsel.

Supreme Court of the United States,

OCTOBER TERM, 1881—No. 233.

THE NEW YORK GUARANTY AND INDEMNITY COMPANY,
Plaintiff in Error,

vs.

THE BOARD OF LIQUIDATION.

Writ of Error to the Supreme Court of Louisiana.

BRIEF FOR PLAINTIFF IN ERROR.

Statement of the Case.

To connect the Mississippi river, just below New Orleans, with Lake Borgne, and so with Ship Island harbor, Mobile and Pensacola, has been for many years, as matter of history, a favorite plan of public improvement. In 1855, the General Assembly of Louisiana endowed R. A. Stewart and his associates with a franchise for that purpose (*Acts of* 1855, *No.* 98). The franchise having been vested in the Mississippi and Mexican Gulf Ship Canal Company, the General Assembly of Louisiana, in 1869, made provision for extending a moderate amount of State aid by passing the act No. 116 of that year. This act will appear in

full in this argument, as printed on the bonds in question. It will appear on the face of the act, as well as by the patent facts of geography, that the policy of the Legislature was to utilize the Bayou Dupres as far as it heads up from the lake, to the river, by providing that the company should straighten and deepen this natural channel as far as it could be used. In this way the aid would be liberal for some three miles, but small for the rest of the way, especially in view of the plain necessity of an enormous lock at the river's edge. On the 19th of April, 1869, the work had so far progressed, on the bayou part, that the Governor directed the President of the Board of Public Works to detail an engineer to report its progress to the executive (*Record, p.* 22), and the Chief Engineer of the State was so detailed (*id.*). On the 23d April, 1869, the Chief Engineer reported that three miles had been completed in accordance with the Act No. 116 of 1869 (*Record, pp.* 22, 23), and thereupon, in accordance with the act, the bonds were issued at the rate provided by the law, being $120,000 per mile, and in all, at that time, the amount of $360,000.

After more than a year of evidently more difficult work in making a canal at this point almost entirely artificial, and in June, 1870, the same engineer, under similar executive instruction, reported another mile done, or four in all (*Record, p.* 23), and the bonds were issued on the fourth mile, making in all $480,000.

Further reports of progress were made by the State Engineer in 1872, which show the canal nearly done and the lock-pit partly dug (*Record, p.* 24).

It will be observed that these $480,000 of bonds were issued prior to the limitation placed on the State debt by the constitutional amendment of November, 1870, so that no point is made against plaintiff by reason of that amendment; on the contrary, in the case of *State ex rel. Salomon and Simpson*, 23d Louisiana Annual, 402, it appears as a matter of history, indisputable and undisputed, that the State herself, intervening in that suit, set up the bonds which had thus been issued as a part of her debt already extant, and the balance still to be issued, $120,000, was a part which she was still liable to incur; and the Supreme Court of the State, in discussing the ques-

tions in the cause, and deciding it in favor of the State, because the amount of the limitation had been so reached, cited these bonds, and the Canal Company, and the Act 116 of 1869, by name. The court said:

"For example, when the Mississippi and Mexican Gulf Ship "Canal Company will have completed the construction of the "lock on said canal, the company will be entitled to demand "the bonds of the State for $120,000, and when issued it will "not be denied the bonds will form a part of the debt of the "State." 23 La. Annual, 405–6, A. D. 1871.

It should here be noted that two days before the passage of this Act 116 of 1869, the General Assembly had passed the Act 66 of 1869, providing means for paying interest on all State bonds then outstanding, or thereafter to be emitted. The necessary parts of this statute are printed in the appendix to this brief (*post*, *p.* 26).

In July, 1871, after the bonds had been not only regularly issued, but successfully set up by the State herself as a defense against the demand of Salomon and Simpson (*Record*, *pp.* 34, 35), the plaintiff in error, plaintiff also below, advanced the sum of $200,000 on a pledge of $250,000 of the bonds forming part of the issues of $480,000. Plainly, the plaintiff became a *bona fide* holder for value before maturity, and entitled to the largest protection which the judicial power of the United States can afford (*Record*, *pp.* 25–30). It is beyond doubt that all the proceeds of this large loan and a great deal more money were expended on the construction of the canal (*Id.*, *pp.* 9–11).

In January, 1874, the General Assembly passed the Act No. 3 of 1874, commonly known as the Funding Bill, a part of which is printed in the appendix of this brief (*post*, *p.* 27), and which law has, to some extent, been passed on by this court in *Board* vs. *McComb*, in *Williams* vs. *Louisiana*, and *Durkee* vs. *Board*, 92 U. S., 531; 103 U. S., 637, 646.

In the same year the General Assembly passed the Act No. 55 of 1874, also printed in the appendix (*post*, *p.* 27), by

which it is clear that all hope and remedy for the plaintiff, and other bondholders, were taken away, except under the Act No. 3 above referred to.

In 1875, the General Assembly passed the Act No. 11 of the extra session of that year, the necessary portions of which are printed in the appendix (*post*, *p.* 28). This act has never, so far as we are aware, been considered by this court. It required that before the bonds in question in this cause and certain others should be funded, it should appear by the decree of the Supreme Court of the State that they were constitutional, and regularly issued for a valid consideration. It was considered that the Legislature did not, by this act, intend to impair the obligation of the contracts of the State; but that, on the contrary, it meant to keep faith with the bondholders, at least with respect to the only means it had left for their protection and payment. In other words, by what we may safely say was a common consensus of opinion in the profession, it was supposed that the rights and conclusive presumptions of law which were vested in the *bona fide* bondholder in 1869, or in 1871, would be respected, and not held to be destroyed, and that the regularity and consideration of the bonds would be conclusively established by the same presumptions which would have been sufficient for that purpose prior to 1875. The sequel will show how the Supreme Court of Louisiana construed the Act No. 11, of 1875, extra session, and how an important federal question is thus presented.

The plaintiff, in May, 1877, commenced this suit by petition in the Fifth District Court for the Parish of Orleans, demanding that its bonds be declared constitutional, regular, of valid consideration and fundable (*Record*, *p.* 1).

After an exception had been overruled the board filed a general denial (*Id. pp.* 5–6).

Upon the trial in the court of the first instance, the plaintiff introduced in evidence the two hundred and fifty bonds in suit, with their endorsements in blank of the President and Treasurer of the Board of Directors of the Canal Company, of

which it is agreed that one bond may be referred to in this court and printed in this argument as a sample of the whole.

Record, pp. 8, 10, 79, *and agreement of counsel filed.*

The following is a copy of a sample bond as it went into the hands of the plaintiff in 1871:

UNITED STATES OF AMERICA.

[C.] [No. 192.

\$1,000] *State Bond to Aid in the Construction of the Mississippi and Mexican Gulf Ship Canal.* [\$1,000\$

IT IS HEREBY CERTIFIED that the State of Louisiana will pay to *Bearer* the sum of one thousand dollars, which sum the said State of Louisiana agrees to pay in current money of the United States, at the office of the State Treasurer, to the said Bearer, in Thirty years from the date hereof, with interest at the rate of $7\frac{3}{10}$ per cent. per annum, payable semi-annually, on 1st day of March and 1st day of September of each year, on the delivery of the interest coupons attached, at the office of the State Treasurer. *For the principal and accruing interest on this Bond, the faith and credit of the State of Louisiana are pledged by act of the General Assembly, No.* 116, *approved March 8th,* 1869, *and which act is published in full on the reverse hereof.*

In testimony whereof, the seal of the State is hereunto affixed, and the signature of the Governor and Secretary of State written in their own hands, this first day of March, 1869.

Impress of the Great Seal of the State of Louisiana.

(Signed) H. C. WARMOTH, *Governor.*

(Signed) GEO. E. BOREE, *Secretary of State.*

[Sixty coupons, of which nine had been paid and detached. Of the remaining fifty-one still attached, the following is a specimen]:

\$36.50. The State of Louisiana will pay to bearer Thirty-six dollars and Fifty cents, at the office of the State Treasurer, or in the City of New York, at the option of the holder, being six months' interest due March 1st, 1874, on bond No. ———, for One Thousand Dollars.

(Signed) (with stamp)

ANT. DUBUCLET, *Treasurer.*

[Endorsements in blank of the president and treasurer of the Board of Directors of the Canal Company.]

(Signed) CYRUS BUSSEY,
Treasurer.
(Signed) JAMES O. NOYES,
President.

[Also following printed endorsement on bond:]

UNITED STATES OF AMERICA,

STATE OF LOUISIANA.

7 3/10 *Per Cent. Bond.*

No. 192.

ONE THOUSAND DOLLARS.

Mississippi and Mexican Gulf Ship Canal.

Interest payable on first day of March and first day of September, in the City of New Orleans or New York.

[The following is printed on the reverse of the bond:]

No. 116.

AN ACT

"Providing State Aid in the Construction of the Mississippi and Mexican Gulf Ship Canal," and for the issue of State Bonds therefor.

PREAMBLE.

WHEREAS, The State of Louisiana is deeply interested in the early completion of the Mississippi and Mexican Gulf Ship Canal, to connect Lake Borgne with the Mississippi, near the head of the English Turn, both on account of the development of the resources of the State, and the improved facilities and immense impetus which would thereby be given to the commerce of New Orleans.

SECTION 1. Be it enacted by the Senate and House of Representatives of the State of Louisiana, in General Assemby convened, that the Governor of this State is hereby authorized and *directed* to issue the bonds of this State to the Mississippi and Mexican Gulf Ship Canal Company, in aid of the said Canal Company, to an amount which shall not exceed six hundred thousand dollars, under the following conditions, viz.:

When the said Mississippi and Mexican Gulf Ship Canal Company, beginning at the mouth of Bayou Dupres, on the shore

of Lake Borgne, shall have completed the proposed canal for a distance of one mile, to the depth of ten feet at ordinary stage of water, with a width of seventy feet at the top and forty feet at the bottom, *either by excavating on a new line or by widening, straightening and deepening the channel of Bayou Dupres, then, upon the certificate of the State Engineer, or of any one of the Engineers of the Board of Public Works selected by the Governor of the State*, that the said work has been done as above provided, the Governor of this State is hereby authorized and *directed* to issue the bonds of the State, to the amount of one hundred and twenty thousand dollars, according to the provisions of this act. That when the said company shall have completed the second, third and fourth miles of *said work*, to the width and depth of the first mile, so as to form a continuous canal, then, upon the certificates of the engineer, as before provided, that the second, third and fourth miles are so completed, each certificate being given on the completion of each of said miles, the Governor is hereby authorized to issue to said company, under the provisions of this act, on the completion of each of the said three miles, the bonds of the State to the amount of one hundred and twenty thousand dollars. That when said Canal Company shall have entirely completed the said canal to the width and depth above specified, with a good and substantial lock at least three hundred feet long and eighty feet wide, so as to afford navigation, at ordinary stage of water in Lake Borgne, from the Mississippi river into Lake Borgne, then, upon the certificate of the engineer, as above provided, that the work is so far finished, the Governor of this State is hereby authorized and directed to issue the bonds of the State to the amount of one hundred and twenty thousand dollars ($120,000), making a total of six hundred thousand dollars ($600,000).

SECTION 2. *Be it further enacted, etc.*, That the bonds of the State issued under the provisions of this act shall be signed by the Governor of the State, and countersigned by the Secretary of State, and sealed with the seal of the State, to an amount not to exceed six hundred thousand dollars, payable in thirty years, and bearing interest, payable semi-annually, at the rate of seven and three-tenths per cent. per annum. The said bonds shall be registered in the books of the Treasurer of the State; shall be dated on the first day of March, one thousand eight hundred and sixty-nine; shall be made in sums of one thousand dollars; shall be payable to bearer, and shall have interest coupons attached, payable in New Orleans, or in the City of New York, at the option of the holder, on the first day of March and first day of September of each year, which interest coupons shall be signed and stamped by the Treasurer of the State. For payment of the principal and interest of the

bonds, *the faith of the State is unconditionally pledged to the holder.* When the bonds of the State are issued to the Mississippi and Mexican Gulf Ship Canal Company, in accordance with the conditions set forth in the first section of this act, the said bonds shall be made transferable by the endorsement of the President and Treasurer of the Board of Directors of said company.

SEC. 3. *Be it further enacted, etc.,* That the said canal, with all its appurtenances, fixtures and lands, acquired either by purchase or grant, shall be and are hereby mortgaged and hypothecated to the State of Louisiana, with the force and effect of a first mortgage, for the full and final payment of bonds so issued, together with the interest thereon, at the rate of seven and three-tenths per cent. per annum.

SEC. 4. *Be it further enacted, etc.,* That the said Canal Company shall, on or before the maturity of any of the interest coupons on any of said bonds, deposit the amount thereof in the State treasury for the payment of the same; and on the event of the failure of said Canal Company to make such deposit for the payment of the interest coupons on any bonds so issued to them, then the State shall have the right to foreclose the mortgage herein given to secure the payment of the bonds and interest issued to said company, according to the provisions of this act.

SEC. 5. *Be it further enacted, etc.,* That the said Canal Company are hereby bound to expend the entire proceeds realized from the sale or hypothecation of the bonds so issued in the opening of the said canal, including the purchase of such adjacent lands as may be deemed desirable by the said company, the construction of a lock, draw-bridges, etc.; and should the said company, at any time, fail to so appropriate the said proceeds, but divert them to objects foreign to the said canal, the said company shall then forfeit their charter and franchises hereby, and the State shall be authorized to foreclose the mortgage herein given upon the said canal, its lands, fixtures and appurtenances.

SEC. 6. *Be it further enacted, etc.,* That after the said canal shall have been opened to the width of seventy feet, and of sufficient depth to permit the passage of vessels drawing ten feet of water, at least one-half of the proceeds of said canal shall be applied to the widening of said canal to at least one hundred feet, through its entire length, from the Mississippi to Lake Borgne, and that in and after the year 1879 (one thousand eight hundred and seventy-nine), at least thirty thousand dollars of the net proceeds of said canal, and the entire net proceeds, in case they do not amount to thirty thousand dollars, shall be paid into the treasury of the State, in liquidation of

the State bonds; the interest upon the amount so paid is to offset the interest upon an equal amount in State bonds, due from the said Canal Company; the said payments to be made each and every year until the sum of six hundred thousand dollars shall have been paid into the State treasury by the said Canal Company, or so much of the said sum as shall fully liquidate its indebtedness to the State.

SEC. 7. *Be it further enacted, etc.*, That in order to provide a fund for the semi-annual payment of interest upon the bonds issued in accordance with this act, and the final redemption of said bonds, should the Mississippi and Mexican Gulf Ship Canal Company fail to meet the obligations set forth in the fourth and sixth sections of this act, when the deficit in interest to the year 1879 (one thousand eight hundred and seventy-nine), or the deficit in the annual installment of thirty thousand ($30,000) dollars from that date to the final redemption of said bonds shall have reached the sum of one hundred thousand dollars ($100,000), and as often thereafter as the said deficit shall have reached that sum, the auditor is hereby directed to determine by accurate calculation what rate of taxation on the total assessed value of all movable and immovable property in the State will be sufficient for the purpose of paying the said deficit in interest or annual installments, or both, and it shall also be his duty to notify the several sheriffs and tax collectors of the rate of taxation as ascertained and fixed for the purpose aforesaid, and said tax, as ascertained and fixed, is hereby levied upon all the movable and immovable property that may be assessed in this State, and it shall be the duty of the several sheriffs and tax collectors to collect said tax; and the collection of the same shall be enforced as the law provides, or may hereafter provide, for the collection of taxes.

SEC. 8. *Be it further enacted, etc.*, That the said Canal Company shall not be permitted to charge more than twenty cents per ton of the registered tonnage upon steamboats, barges, sailing vessels, or vessels of any description passing through the said canal over and above the cost of towage, and that the said corporation is hereby authorized to avail itself of the provisions of the general expropriation law of Louisiana, approved February (22) [illegible] fty-

[illegible] he
[illegible] of
no[illegible] ontchartrain, and the company still at work, with machinery
the sixteenth of June, and am glad to say that I found

bonds, *the faith of the State is unconditionally pledged to the holder.* When the bonds of the State are issued to the Mississippi and Mexican Gulf Ship Canal Company, in accordance with the conditions set forth in the first section of this act, the said bonds shall be made transferable by the endorsement of the President and Treasurer of the Board of Directors of said company.

SEC. 3. *Be it further enacted, etc.,* That the said canal, with all its appurtenances, fixtures and lands, acquired either by purchase or grant, shall be and are hereby mortgaged and hypothecated to the State of Louisiana, with the force and effect of a first mortgage, for the full and final payment of bonds so issued, together with the interest thereon, at the rate of seven and three-tenths per cent. per annum.

SEC. 4. *Be it further enacted, etc.,* That the said Canal Company shall, on or before the maturity of any of the interest coupons on any of said bonds, deposit the amount thereof in the State treasury for the payment of the same; and on the event of the failure of said Canal Company to make such deposit for the payment of the interest coupons on any bonds so issued to them, then the State shall have the right to foreclose the mortgage herein given to secure the payment of the bonds and interest issued to said company, according to the provisions of this act.

SEC. 5. *Be it further enacted, etc.,* That the said Canal Company are hereby bound to expend the entire proceeds realized from the sale or hypothecation of the bonds so issued in the opening of the said canal, including the purchase of such adjacent lands as may be deemed desirable by the said company, the construction of a lock, draw-bridges, etc.; and should the said company, at any time, fail to so appropriate the said proceeds, but divert them to objects foreign to the said canal, the said company shall then forfeit their charter and franchises hereby, and the State shall be authorized to foreclose the mortgage herein given upon the said canal, its lands, fixtures and appurtenances.

SEC. 6. *Be it further enacted, etc.,* That after the said canal shall have been opened to the width of seventy feet, and of sufficient depth to permit the passage of vessels drawing ten feet of water, at least one-half of the proceeds of said canal shall be applied to the widening of said canal to at least one hundred feet, through its entire length, from the Mississippi to Lake Borgne, and that in and after the year 1879 (one thousand eight hundred and seventy-nine), at least thirty thousand dollars of the net proceeds of said canal, and the entire net proceeds, in case they do not amount to thirty thousand dollars, shall be paid into the treasury of the State, in liquidation of

the State bonds; the interest upon the amount so paid is to offset the interest upon an equal amount in State bonds, due from the said Canal Company; the said payments to be made each and every year until the sum of six hundred thousand dollars shall have been paid into the State treasury by the said Canal Company, or so much of the said sum as shall fully liquidate its indebtedness to the State.

SEC. 7. *Be it further enacted, etc.*, That in order to provide a fund for the semi-annual payment of interest upon the bonds issued in accordance with this act, and the final redemption of said bonds, should the Mississippi and Mexican Gulf Ship Canal Company fail to meet the obligations set forth in the fourth and sixth sections of this act, when the deficit in interest to the year 1879 (one thousand eight hundred and seventy-nine), or the deficit in the annual installment of thirty thousand ($30,000) dollars from that date to the final redemption of said bonds shall have reached the sum of one hundred thousand dollars ($100,000), and as often thereafter as the said deficit shall have reached that sum, the auditor is hereby directed to determine by accurate calculation what rate of taxation on the total assessed value of all movable and immovable property in the State will be sufficient for the purpose of paying the said deficit in interest or annual installments, or both, and it shall also be his duty to notify the several sheriffs and tax collectors of the rate of taxation as ascertained and fixed for the purpose aforesaid, and said tax, as ascertained and fixed, is hereby levied upon all the movable and immovable property that may be assessed in this State, and it shall be the duty of the several sheriffs and tax collectors to collect said tax; and the collection of the same shall be enforced as the law provides, or may hereafter provide, for the collection of taxes.

SEC. 8. *Be it further enacted, etc.*, That the said Canal Company shall not be permitted to charge more than twenty cents per ton of the registered tonnage upon steamboats, barges, sailing vessels, or vessels of any description passing through the said canal over and above the cost of towage, and that the said corporation is hereby authorized to avail itself of the provisions of the general expropriation law of Louisiana, approved February (28) twenty-eight, (1855) eighteen hundred and fifty-five.

Approved March 8, 1869.

The plaintiff also introduced the official documents, D, E, F, G, H, I, and J, as follows (*Record, pp.* 22–25):

+ As to adequate means see People v. Allen 6 Lansing N.Y. 248: State v. R.R. 60, 25 La ann. 65: Hamlin v. Board 30 Ind. 446: Acts of La of 1853 No 277.

DOCUMENT "D."

STATE OF LOUISIANA, EXECUTIVE DEPARTMET,
New Orleans, April 19, 1869.

Gen. MARTIN FLOOD, *President Board Public Works:*

Sir,—I have the honor to request you to order an engineer to report to me, for the purpose of making a survey of the work done on the Mexican Gulf Canal, in accordance with provisions of Act 116 of the Legislature of 1869, approved March 8th, 1869.

[Signed] H. C. WARMOTH,
Governor of Louisiana.

DOCUMENT "E."

April 20th, 1869.

Gen. M. JEFF. THOMPSON, *Engineer Board of Public Works:*

Sir,—You will, without delay, report to Hon. H. C. Warmoth, Governor of Louisiana, for the purose of making an examination and survey of work on the Mexican Gulf Canal, in accordance with provisions of Act No. 116 of the Legislature of 1869, approved March 8th, 1869.

Very respectfully,

[Signed] R. D. MITCHELL,
Secretary.

DOCUMENT "F."

STATE OF LOUISIANA,
Engineer's Office, Board Public Works,
New Orleans, La., April 23, 1869.

To his Excellency H. C. WARMOTH, *Governor of Louisiana:*

In pursuance of your order directing me to survey and examine the condition of the Mexican Gulf Canal, in conformity with Act No. 116 of the Legislature of Louisiana, approved March 8th, 1869, I have the honor to report and certify that I have personally visited and inspected the Bayou Dupres, and the work done by the Mexican Gulf Canal Company, and that I found in Bayou Dupres, from Lake Borgne, and in the direction of the Mississippi river, more than three consecutive miles channel with a width of more than seventy feet on the surface, more than forty feet on the bottom, and with more than ten feet in depth, in fact, with sufficient capacity to accommodate any vessel now plying on the waters of Lake Borgne or Lake Pontchartrain, and the company still at work, with machinery

and manual labor, in straightening and widening the bayou, and I hereby certify that the Mississippi and Mexican Gulf Canal Company are now entitled to such issue of bonds as said Act No. 116 authorizes for three consecutive miles of the dimensions specified from Lake Borgne towards the Mississippi river.

I have the honor to be most respectfully, your obedient servant,

[Signed] M. JEFF. THOMPSON,
Chief Engineer Board of Public Works.

DOCUMENT "G."

OFFICE BOARD OF PUBLIC WORKS,
CHIEF ENGINEER'S OFFICE,
New Orleans, La., June 16, 1870.

To his Excellency H. C. WARMOTH, *Governor of Louisiana:*

Governor,—In compliance with your instructions I have examined and measured the work done by the Mississippi and Mexican Gulf Canal Company on their canal, since my report to your Excellency on April 23, 1869. I hereby certify they have completed their canal to a point *four miles* from the Martello tower on Lake Borgne, and that the same is done in accordance with the specification enumerated in Act No. 116, approved March 8, 1869. Therefore said company are now entitled to the issue of State bonds, for the fourth mile, as provided in said act, in addition to the three miles embraced in my report of April 23, 1869. Permit me to add that their preparations for work exceed anything of the kind ever seen in this State, and that we may anticipate an early completion of this important work.

I have the honor to be your obedient servant,

(Signed) M. JEFF. THOMPSON,
Chief Engineer.

DOCUMENT "H."

Report of M. Jeff. Thompson, Chief Engineer, Dated 31st December, 1870.

[EXTRACT.]

"His Excellency the Governor directed me to examine the Mississippi and Mexican Gulf Canal, and report the progress of the work to him. I did so on the 23d of April, and on the sixteenth of June, and am glad to say that I found

the work being pushed with a vigor that was commendable, and so reported. *The most powerful dredge-boats and derricks in the Union are employed, and it is astonishing to see the amount of work performed by them;* at an early day the canal will be near enough to the Mississippi river to commence business, and early next summer I hope to see the lock completed."

I certify that the above is a true extract from page 65 of the Chief Engineer's Report to the Board of Public Works, and from thence to the General Assembly of Louisiana, Session of 1871; said report is dated December 31, 1870, and can be found in this office.

October 22, 1875.

(Signed) K. B. THOMPSON,
Secretary of Board State Engineers.

DOCUMENT "I."

JUNE 19, 1872.

Dr. J. O. NOYES, Miss. and Mex. Gulf Canal Company:

Dear Sir,—In accordance with your request for an abridged statement of the condition of the Mississippi and Mexican Gulf Canal, I report that on April 23d [1869], I examined that work officially, and gave a certificate for three consecutive miles, of more than 70 feet surface, 40 feet on bottom, and 10 feet of depth; and on June 16, 1870, I again examined the work, and gave a certificate of another mile of similar work, and since that time I have several times visited the work unofficially, and found the work pushed up to the lock pit, which was partially dug, and the canal from the four-mile post to the lock pit, more than half width.

That this work could be now speedily finished, and that it will be a great channel of commerce, and profitable if properly managed, there can be no doubt.

Yours most respectfully,
(Signed) M. JEFF. THOMPSON,
Chief State Engineer.

DOCUMENT "J."

Report of Board of State Engineers to the General Assembly, dated 31st December, 1872.

[EXTRACT.]

"LAKE BORGNE CANAL.

"There has been no active prosecution of this important work since our last report. At that time the dredges had all

been removed to the City of New Orleans, to work upon the drainage canals, under the contract between the Lake Borgne Canal Company with the City of New Orleans. This canal now stands much more than half finished, and the only costly work will be the building of the lock, which, at the reduced size authorized by the Act No. 28, approved April 22, 1872, will not be a great undertaking. Since the building of the Mobile and New Orleans Railroad, much of the anticipated profit and business of this canal has been diverted; yet, if completed at reduced depth of lockage, compared with original plans, it cannot but be profitable to the stockholders, and useful to the State and the commerce of the Mississippi river with the Gulf coast.

"The State has a large interest in the successful completion of this work, which will enable the company to meet their obligations to the State, and eventually retire the bonds issued to them as contemplated by law. We therefore recommend that such modifications be made in the laws authorizing this work as will enable the company to complete this canal conformably with present necessities and the condition of our city and State finances."

"I certify that the above is a true extract from the report of the Board of State Engineers to the General Assembly of Louisiana, session of 1873. Report dated December 31, 1872, pages 6 and 7.

"K. B. THOMPSON,
"*Secretary of Board of State Engineers.*"

The plaintiff also introduced in evidence the proceedings in the case of State *ex rel.* Salomon & Simpson *vs.* Graham, which are agreed to be referred to in the 23d La. Annual, page 402, *et seq.*, the certificate of the due registration of the bonds on the books of the State Treasurer (*Record, pp.* 8, 9, 36), and the other documentary evidence noted in the record (*Id., pp.* 8, 9), and proved that all the money received by the Canal Company from the negotiation of the bonds, and much more, had been expended in the construction of the canal, and then, upon certain oral testimony being offered by defendant, objected thereto, and, the objection being overruled, reserved the following bill of exceptions, which recites the points made and ruled upon (*Id., pp.* 46, 47).

"Be it remembered that, on the trial of this cause, after the plaintiff had introduced its evidence, including the bonds in

suit, and the certificates of M. Jeff. Thompson, State Engineer (documents marked *D*, *E*, *F*, *G*, *H*, *I* and *J*), and had proved by the direct-examination of Cyrus Bussey that all the money received by the Mississippi and Mexican Gulf Ship Canal Company from proceeds of State bonds issued under Act 116 of 1869 had been expended in the construction of said canal, together with a large amount of private capital, and particularly the sum of two hundred thousand dollars borrowed by said Canal Company on the pledge of said bonds, the defendant's counsel, on direct-examination of the witnesses, Merrill and Gillespie, and the cross-examination of Bussey, proceeded to inquire in regard to the amount and value of the work done by said Canal Company in the improvement of the channel of Bayou Dupré, and the excavation of the artificial portion of the canal for four miles, and mile by mile from the mouth of said bayou at Lake Borgne towards the Mississippi river, prior to the issue of bonds with reference to said miles respectively; and to all said questions, and to all testimony of this kind sought to be elicited thereby, the counsel for plaintiff, as the said questions were propounded, duly objected, for the following reasons.

"1. That the said questions and testimony were improper and inadmissible under the pleadings, the answer containing no allegation of fraud or error.

"2. That said questions and testimony were not admissible to contradict, vary or modify the recitals in and on the bonds, or the said certificates of a sworn officer.

"3. That the evidence prescribed by Act No. 116 of 1869, upon which the Governor was directed to issue said bonds, was the said certificate of the State Engineer, and no other evidence is admissible.

"4. That said certificate of the State Engineer and the recitals in the bonds by the Governor and Secretary of State, were and are a decision of a question by sworn officers of the Executive Department of the State Government, in whom the Act No. 116 of 1869, had vested the power and jurisdiction to decide the same, and whose duty it was to decide the same;

that Act 116 of 1869, is a part of the contract and the law of the case, and has never been repealed or modified, *nor could it be;* and that the decision of said executive officers (concerning which no fraud has ever been averred in any way), was and is final, and cannot be enquired into and reversed by the Judicial Department of the Government.

"5. That said bonds were issued to aid the construction of the canal, and their purpose, as shown by Act No. 116 of 1869, was that they might be negotiated, sold, or pledged; that the evidence furnished by the recitals in the bonds and the said certificates was, under the terms of the statute and the *pledge of faith* therein contained, conclusive in its character in favor of the regularity of the issue of the bonds, and the validity of the consideration, and could not be contradicted or qualified by parol testimony offered some seven or eight years after the issue and negotiation of said bonds, and especially as against the plaintiffs, who had advanced two hundred thousand dollars on the faith of said statutes, certificates and bonds, which money, as shown by direct testimony of Bussey, had been expended on the said canal.

"But the court overruled said objections, and permitted said questions to each of said witnesses, to which ruling counsel for plaintiff *duly excepted, and it was agreed that said objections and exceptions should cover and include all testimony of similar purpose and import.*"

The case was decided against the plaintiff in the Court of First Instance (*Record*, p. 54), and plaintiff appealed to the Supreme Court of Louisiana (*Id.*, p. 53). That court affirmed the judgment, and delivered an extended opinion (*Id.*, p. 50), in which the Act No. 11, of 1875, extra session, was construed and applied to defeat the contract rights of plaintiff, in such way as we submit, as to make that act impair the obligations of contracts.

Under the practice of Louisiana the plaintiff then filed its petition for a rehearing, which, under the Code of Practice, is a pleading in the cause (*La. Code of Practice, Arts.* 912, 914). And in this pleading, the federal questions we now present here were more fully set forth in the method approved by

your Honors, in Stewart *vs.* Kahn, a Louisiana case (11 *Wallace*, 493). In no other way, as was held in that decision, could the plaintiff, in a State Court of Louisiana, so well raise a federal question in such a case under the system of pleading there in force.

The petition for a rehearing pleaded as follows (*Record, p.* 72):

"*First.*—Petitioner avers and shows that the Act No. 11, of 1875, extra session, as drawn in question, set forth, relied on and construed in the said opinion and decree of your Honors, is, as thus construed, unconstitutional, null and void, being in conflict with article first, section tenth of the Constitution of the United States, which provides that no State shall pass any law impairing the obligation of contracts.

The suit at bar is instituted under the Act No. 3, of 1874, commonly called the Funding Bill. The defendant is created by that act, and by that act alone is this action authorized.

By the Act No. 55, of 1874, to which the attention of your Honors is now specially called, all remedies of this petitioner and other bondholders are taken away, except those which existed through the Act No. 3, and the action thus given to compel a funding in new consolidated bonds.

"Petitioner was thus left with one practical and present remedy only, to fund its bonds by action or suit under said Act No. 3, of 1874. It had a right to accept that situation, and it did, provided, always, that its bonds should be funded. It brought its suit under that act. It is met in the pleadings with a general denial only. In the argument, and in the opinion of the court, it is met with the Act No. 11, of 1875, extra session, which, as construed by your Honors, makes an illegal assault on the bonds held by petitioner; impairs their obligation, takes away the rights of petitioner, which had existed for years, as a *bona fide* holder of them, relieves the State of its own judicial admissions in the case of the State *vs.* Graham, and changes rules of evidence to the prejudice of plaintiff.

"The bonds acquired by petitioner in 1871, the Law of 1869 under which they were issued, and the several provisions of that law, constitute contracts in favor of petitioner, which could not be lawfully impaired by the State. If it be said

that the Acts Nos. 3 and 55, of 1874, above referred to, in view of which this suit was brought, also impair the obligations of said contracts, the reply is evident, that petitioner may waive its objections to such impairment, and submit to the funding regime; and petitioner has done this on condition that its bonds should be funded. But petitioner is not obliged to waive any other right. No earthly power can force it, lawfully, to any other concession.

"Petitioner is willing to accept the pittance of sixty cents offered by the Act No. 3, of 1874, and to ask for it by the suit provided in that act, but when your Honors declare that even that pittance should be refused, because the Act No. 11, of 1875, in the opinion of your Honors, takes it away, then the Act No. 11, of 1875, takes away the last shred of remedy and right; strikes the *coup de grace* at the contracts of petitioner; and petitioner has a right to invoke, and does invoke, the Constitution of the United States, as cited above, with all the results implied in such pleading.

"Reference is here made to the late case of Hall *vs.* Decuir (95 *U. S.*, 485), where the Supreme Court of the United States has reversed the decree of the Supreme Court of Louisiana, because the statute there in question, as construed by the State Court, conflicted with the Constitution of the United States; and also to the cases of Gelpke *vs.* Dubuque, 1 Wallace, 175, and Thomson *vs.* Lee County, 3 Wallace, 327.

"*Second.*—Petitioner submits that your Honors have erred in ruling that testimony might be admitted to vary, contradict or affect the certificates of the Chief State Engineer, upon which the bonds were issued. By the Act of 1869, authorizing the bonds, they were to be issued on these certificates, and for the payment of the principal and interest of the bonds so issued, 'the faith of the State is unconditionally pledged to the holder.' The bonds, which are in evidence, recite that they were issued according to the act, and the act is printed on their reverse. The plaintiff, becoming holder in 1871, took them with the solemn assertions made by the proper officers who signed the bonds, and the certificates on which those officers acted. Moreover, there is in the pleadings no allegation of either error or fraud. By the law, as it existed in 1869 and 1871, the certifi-

cates were the evidence, and the only evidence proper in the premises."

Orleans Co. vs. *Allard*, 6 Louisiana, 491.
Town of Coloma vs. *Eaves*, 92 U. S., 487.

"This dilemma is presented: Either the Act No. 11, of 1875, is null and void, as set forth above, because it impairs the obligation of plaintiff's contracts, acquired under the Act 116, of 1869, including the right to safely rely on said certificates as conclusive, or else it does not take away that right, and the certificates were and are conclusive."

Other points were made in the petition for rehearing, which it is not necessary to repeat. It is sufficient to say that the Supreme Court of Louisiana refused the rehearing, thereby overruling the points above set forth. The plaintiff thereupon took its writ of error.

ASSIGNMENT OF ERRORS.

The Supreme Court of Louisiana erred:

(1.) In affirming the judgment of the Fifth District Court for the Parish of Orleans, rendered Jan. 15, 1878, and signed Jan. 19, 1878 (*Record, p.* 54).

(2.) In refusing the petition of plaintiff for a rehearing (*Id., p.* 76).

(3.) In not reversing the judgment of the Fifth District Court for the Parish of Orleans, and in not rendering a judgment that the bonds held by plaintiff, issued under Act 116 of 1869, were and are valid, and fundable under the Act No. 3 of 1874, and Act No. 11 of 1875, extra session.

(4.) In holding that the Act No. 11 of 1875, extra session, as applied by the said court in this cause, did not and does not

impair the obligation of the contracts between the plaintiff, as holder of said bonds issued under Act 116 of 1869, and the State as the obligor of said bonds.

(5.) In holding that the Act No. 11 of 1875, extra session, as applied by the said court in this cause, did not impair the obligation of the contracts existing between the State and the plaintiff as holder of said bonds issued under the Act 116 of 1869, and the Act No. 3 of 1874, coupled with the acceptance by the plaintiff of the offer of the State made in and by said last mentioned act for funding the bonds held by it in the manner therein prescribed.

(6.) In holding that the Act No. 11 of 1875, extra session, destroyed the conclusive presumptions in favor of the regularity of the issue of the bonds held by plaintiff, and in favor of the adequacy of their consideration, and yet did not impair the obligation of the contracts between plaintiff and the State.

(7.) In holding that the Act No. 11 of 1875, extra session, authorized the court to receive oral and other testimony to destroy the conclusive presumptions in favor of plaintiff's bonds as to regularity and consideration, and in receiving such testimony; and, nevertheless, holding that the said Act No. 11 of 1875, extra session, did not impair the obligation of the contracts between plaintiff and the State.

(8.) In holding that as between the plaintiff below and the Board of Liquidation, as the agent of the State of Louisiana, and representing said State, the plaintiff was bound to make out or establish any other or better title to the bonds in question, or any other right to have the same funded than that of a *bona fide* holder who had acquired title thereto after a valid issue of said bonds, and in conformity with the requirements of the statute authorizing the issue thereof, and for value, irrespective of any question which might be raised between the State and its officers as to entire adequacy of consideration, or as to the manner of performance of any of the several acts required by said statute to be done by any public officer of the State, it being affirmatively shown that such required acts were actually

performed, and all the substantial provisions of the statute complied with, and nevertheless holding that said Act No. 11 of 1875, extra session, did not impair the obligation of the contracts between plaintiffs and the State.

ARGUMENT.

In the cases of *Williams* vs. *Louisiana*, and *Durkee* vs. *The Board of Liquidation*, decided at the last term (103 *U. S.*, 637–648), your Honors had occasion to make some examination of the constitutional amendment of November, 1870, limiting the State debt of Louisiana, and of the Funding Act of 1874. Those cases were decided adversely to the bondholders. But it is submitted that those decisions can have no force as against the plaintiff at bar. In those decisions the bonds considered were found to be unconstitutional and void. There was no power to issue them. They were absolute nullities from their date, and their holders had no rights as *bona fide* purchasers. This is elementary.

But there are facts in the controversy at bar which differentiate it from those cases with distinctness. The bonds acquired by plaintiff here were constitutional beyond doubt. They were issued before the amendment of 1870. They were pleaded by the State as part of its debt in the case of Salomon and Simpson (23 *La. Annual*, 402). They were issued to aid the construction of a public highway of trade and commerce, in which the State had the highest concern, and their proceeds, beyond dispute, went to that work.

What, then, was the obligation of the contract, as between plaintiff and the State, when plaintiff acquired the bonds?

An obligation, which in the case at bar springs from a contract, is defined by the Institutes of Justinian in words which are familiar, but which, we trust, will never lose their density of meaning. It is a legal tie, a *vinculum juris*, by which one is bound to do or to pay something. The phrase *vinculum*

+ Pine Grove v. Talcott, 19 Wall 666. 676. State v. Nicholls 30 La Ann. 987. Cooley on Const. Lim. p. 532.

juris, as remarked by a distinguished French magistrate (*Larombiere on Ob.*, vol. 1, p. 5), is an energetic expression signifying the tenacity of the legal tie, which is thus likened to a fetter of steel. It is only when men become utterly dissolute that such ties are converted into ropes of sand.

How shall we determine what the obligation was in this case? By reference to the Law 116 of 1869, the certificates given, and the recitals of the bonds issued thereunder, and the rights thereby vested in the purchaser of such bonds. As long ago as the year 1828, the Supreme Court of Louisiana, in a leading case, laid down this rule (*Sabatier et al.* vs. *Their Creditors*, 6 Martin, N. S., 589). It is a rule which at this day hardly requires a citation of precedents (*Edwards* v. *Kearzey*, 96 U. S., 595). When, then, we examine the statute, the certificates and the bonds, the obligation of the debtor State is found to contain, at least, these elements:

(1.) An obligation on the part of the State, through its executive, to issue the bonds to the company, whenever it shall have been certified by a State engineer that the installment of work has been done acording to the Act 116, of 1869.

(2.) An obligation to pay the principal and interest of the bonds, to provide certain taxes for this purpose, or at least to provide *some* method for the satisfaction of the debt.

(3.) An obligation in favor of plaintiff, to treat as conclusive the finding of the Governor, based on the certificates of the State Engineer, that the work had been done according to the Act 116, of 1869.

Town of Coloma v. *Eaves*, 92 U. S., 484.
Marcy v. *Township*, *Id.*, 637.
Orleans Co. v. *Allard*, 6 Louisiana, 491.

(4.) An obligation to treat as conclusive the presumptions arising in favor of plaintiff from the bonds, their recitals, and the certificates on which they were issued.

Town of Coloma v. *Eaves*, 92 U. S., 484.
Marcy v. *Township*, *Id.*, 637.
Orleans Co. v. *Allard*, 6 Louisiana, 491.

(5.) An obligation binding the faith of the State unconditionally as respects the bonds so issued.

It seems plain that if the debtor State itself can, by the exercise of its own volition, and through its Legislature, destroy any of these obligations, the axe is laid at the root of all public faith and public confidence in State securities. The question whether such securities can secure, answers itself at once in the negative. We have appealed to this high tribunal for protection, and upon the facts of the case, as developed in the record, we make the following points, and cite the following authorities.

I.

The question whether the Act No. 11 of 1875, extra session, is unconstitutional, as in conflict with the tenth section of article one of the Constitution of the United States, must be approached by considering: first, the construction which the court of last resort of Louisiana has placed upon it; and second, what is the effect of that act, as so construed, upon the obligation of the contracts between the plaintiff, as creditor, and the State, as debtor.

If the Supreme Court of Louisiana had so interpreted the Act No. 11 as to impair no obligation of plaintiff's contracts, the plaintiff would in vain appeal to this tribunal. If it has construed that act in such way that it does impair the obligation of those contracts, then the appeal to this court for redress should not be fruitless.

And this we understand to be the rule settled in *Hall* vs. *Decuir* (95 *U. S.*, 485), where it was held that a statute of Louisiana, which might have been interpreted and applied so as to make it valid under the national Constitution, was so construed and applied by the Supreme Court of that State that it thereby became, as to that controversy, unconstitutional, null and void, and was, to all intents and purposes, reputed as not written.

II.

We now submit that the Act No. 11 of 1875, extra session, as construed by the Supreme Court of Louisiana, impaired and impairs the obligation of the contracts between plaintiff and the State of Louisiana, vested in plaintiff, by its acquisition of the bonds in suit, in July, 1871.

Recurring to the facts above stated, it will be seen that the only satisfaction and remedy the plaintiff could have when its suit was begun, was a "funding" under Act 3 of 1874. The Act 55 of 1874, had swept away all other hope. It was willing to fund its bonds. It was willing to present these negotiable investments, to establish its *bona fide* acquisition before maturity, and thus to prove by conclusive presumptions, vested in it under the law, the regularity and valid consideration of the bonds. Being a *bona fide* holder of the bonds before maturity, for value, and there being power to make the bonds, and the certificates provided by the statute having been given, and the Executive of Louisiana having decided that the bonds should issue, and the bonds having been issued, and reciting that they had been so put forth in compliance with the law of 1869 printed upon them, and the faith of the State being pledged unconditionally in respect to the bonds, it was the right of plaintiff at all times to establish the regularity and consideration of the bonds by these facts simply; nay, by the mere production of the bonds; and it was an obligation resting at all times on the State to respect this right. The State could have no right to show, as against plaintiff, that the bonds were irregular or without valid consideration.

Such we understand to be the rule laid down in *Grand Chute* vs. *Winegar*, 15 Wallace, 355, a leading and unanimous decision of this tribunal; and such was the rule in the following cases there approved:

Knox Co. vs. *Aspinwall*, 21 Howard, 539.
Mercer Co. vs. *Hacket*, 1 Wallace, 83.
Meyer vs. *Muscatine*, *Ib.*, 384.
Woods vs. *Lawrence Co.*, 1 Black., 386; and
Gelpcke vs. *Dubuque*, 1 Wallace, 175; and also in
Town of Coloma vs. *Eaves*, 92 U. S., 487.

In the decision in Town of *Coloma* vs. *Eaves*, this court said, in regard to an issue of bonds under circumstances similar to that in the case at bar:

"After all this, it is not an open question, as between a *bona fide* holder of the bonds and the township, whether all the prerequisites to their issue had been complied with. Apart from and beyond the reasonable presumption that the officers of the law, the township officers, discharged their duty, THE MATTER HAS PASSED INTO JUDGMENT. The persons appointed to decide whether the necessary prerequisites to their issue had been completed have DECIDED, AND CERTIFIED THEIR DECISION. They have declared the contingency to have happened on the occurrence of which the authority to issue the bonds was complete. Their recitals are such a DECISION, and beyond those a *bona fide* purchaser is not bound to look for evidence of the existence of things *in pais*. He is bound to know the law conferring upon the municipality power to give the bonds on the happening of a contingency; but whether that has happened or not, is a question of fact, the decision of which is by the law confided to others—to those most competent to decide it—and which the purchaser is, in general, in no condition to decide for himself.

"This we understand to be the setled doctrine of this court. Indeed, some of our decisions have gone further."

See also Orleans Co. vs. *Allard*, 6 Louisiana, 491.

We submit that any statute which is construed to take away these rights *in a proceeding which is the only remedy left to plaintiff* is the final and fatal blow aimed by the State at the obligation of its contracts and is, therefore, null and void.

As stated in our bill of exceptions in the court of first instance, and in our petition for a rehearing in the State Court of last resort, the provisions of the Act 116, of 1869, which made the certificate of the Engineer and the action of the Governor conclusive as to the regularity and consideration of the bonds, and pledged the faith of the State "unconditionally" to the fulfillment of the obligation of the bonds so issued, formed part of the contract and could not be repealed or impaired in any wise.

The State appears in this proceeding in a double capacity; as a legislator, and as a contracting party. In the latter capacity, she is subject to the same rules as a private person or

corporation, under like circumstances, and can claim no immunity in virtue of her political sovereignty.

Davis vs. *Gray*, 16 Wallace, *at p.* 232.

And we refer generally to the following cases:

Green vs. *Biddle*, 8 Wheaton, 1.
Bronson vs. *Kinsie*, 1 Howard, 311.
McCracken vs. *Hayward*, 2 Howard, 608.
Curran vs. *Arkansas*, 15 Howard, 304, p. 319.
Chicago vs. *Sheldon*, 9 Wall, 50.
Fletcher vs. *Peck*, 6 Cranch, 87.
Trustees, &c., vs. *Beers*, 2 Black., 448.
Hawthorne vs. *Calef*, 2 Wall., 10.
White vs. *Hart*, 13 Wall., 646.
Delmas vs. *Ins. Co.*, 14 Wall., 661.
Walker vs. *Whitehead*, 16 *Id.*, 314.
Olcott vs. *Supervisors*, *Id.*, 678.

If the action of the State, as legislator, when construed by her courts, impairs her obligation as contracting party, such action is held for nought.

III.

It is submitted, then, that the Act No. 11 of 1875, extra session, of the General Assembly, as construed by the Supreme Court of Louisiana in this cause, should be declared to be void, and reputed as not written; that the presumptions vested in plaintiff by its acquisition of the bonds in suit in the year 1871 should be declared conclusive; that the ruling of the Supreme Court of Louisiana to the contrary should be declared erroneous, and the judgment reversed.

WILLIAM WIRT HOWE,
JOHN H. KENNARD,
WILLIAM ALLEN BUTLER,
Of Counsel.

APPENDIX.

Act No. 66, of 1869.

No. 66. AN ACT

To provide for the Payment of the Annual Interest on all State Bonds issued, o f which may hereafter be issued:

SECTION 1. Be it enacted, by the Senate and House of Representative of the State of Louisiana, in General Assembly convened, that it shall be the duly or the Auditor of Public Accounts, at the end of each and every year, or as soon thereafter as he shall have received the assessment rolls from the several parishes and the City of New Orleans, to determine, by accurate calculation, what rate of taxation on the total assessed value of all the movable and immovable property in the State will be sufficient to pay the interest becoming due annually on all the bonds issued by the State, or those that may be issued hereafter. and said tax so ascertained and fixed is hereby annually levied upon the movable and immovable property that may be assessed in the State and it shall be the duty of said Auditor of Public Accounts to notify the State Tax Collectors of the tax so ascertained and fixed, and direct them to collect and account for the same, in accordance with existing laws or those that may hereafter be enacted; provided, that nothing contained in this act shall be so construed as to conflict with the provisions of the act entitled An Act to provide means for the Construction of Levees by the issue of bonds of the State for four millions of dollars, and to provide for the redemption of said bonds, approved March twenty-six, eighteen hnndred and sixty-seven.

SECTION 2. Be it further enacted, etc., that the tax levied by the first section of this act shall be known as the Interest Tax, and when paid into the State Treasury shall be credited on the books of the Treasury Department to a fund to be called the *Interest Tax Fund, and shall be held sacred for the purposes contemplated by this act.* It shall be the duty of the Auditor and Treasurer, as soon as this law goes into operation, to transfer to the "Interest Tax Fund" created under this act whatever balance may remain in the Treasury to the credit of the Internal Improvement Tax Fund, it being the intent ank purpose to provide by law for the interest upon all State bonds, and to create one fund alone.

* * * * *

Approved March 6, 1869.

Act No. 3, 1874.—The Funding Act.

No. 3. AN ACT

To provide for funding obligations of the State by exchange for bonds; to provide for principal and interest of said bonds; to establish a board of liquidation; to authorize certain judicial proceedings against it; to define and punish violations of this act; to prohibit certain officers diverting funds except as provided by

law, and to punish violations therefor; to levy a continuing tax and provide a continuing appropriation for said bonds; to make a contract between the State and holders of said bonds; to prohibit injunctions in certain cases; to limit the indebtedness of the State, and to limit State taxes; to annul certain grants of State aid; to prohibit the modification, novation or extension of any contract heretofore made for State aid; to provide for the receipt of certain warrants for certain taxes, and to repeal all conflicting laws.

SECTION 1. Be it enacted by the Senate and House of Representatives of the State of Louisiana in the General Assembly convened, that for the purpose of consolidating and reducing the floating and bonded debt of the State, the Governor, Lieutenant Governor, Auditor, Treasurer, Secretary of State, and Speaker of the House of Representatives are hereby authorized to cause to be prepared, and to issue bonds, to be known as "Consolidated Bonds of the State of Louisiana," of the denominations of one hundred, five hundred and one thousand dollars, to the amount of fifteen millions of dollars, or so much thereof as may be necessary, all payable forty years from the first day of January, 1874, and all to be numbered consecutively and made payable to bearer, and to bear interest at the rate of seven per cent. per annum, payable semi-annually in the City of New York and City of New Orleans, on the first day of July and January of each year, and coupons for such interest shall be annexed thereto; said interest and principal to be payable in lawful money of the United States.

SECTION 2. Be it further enacted, etc., That the parties designated in the foregoing sections shall constitute a board of liquidation, and a majority of said board shall elect a fiscal agent for the State, who shall be a member of said board.

SECTION 3. Be it further enacted, etc., That the bonds authorized by section one shall be signed by the Governor, Auditor and Secretary of State, and the coupons shall be signed by the Auditor and Treasurer; and when so prepared, said bonds shall be exchanged by the board of liquidation for all valid outstanding bonds of the State, and all valid warrants drawn previous to the passage of this act by the respective Auditors of Public Accounts of the State on the Treasurer thereof, excepts warrants issued by the Auditor in payment of the constitutional officers of the State, at the rate of sixty cents in consolidated bonds for one dollar in outstanding bonds, and all valid warrants; provided, that the holder of any bond or valid warrant rejected by a majority of said board may apply by petition to the proper court for relief, and if final judgment shall be rendered in his favor against said board, it shall be the duty of said board to fund his said claim in bonds at the rate provided by this act; and provided further, that if any member of said board of liquidation shall knowingly audit and fund any illegal claim against the State he shall be deemed guilty of a misdemeanor, and shall, on conviction, be fined not less than five thousand dollars and be imprisoned not less than two years, at the discretion of the court, and any person knowingly procuring the same to be done shall be subject to the same penalty.

Approved Jan. 24, 1874.

Act No. 55, 1874.

No. 55. AN ACT

Relative to the assessment and collection of State taxes imposed for the payment of the bonds of the State, and the principal and interest of the State debt, by virtue of any law passed prior to the first of January, 1874, and to repeal all laws requiring or authorizing the Governor or Auditor or Treasurer to set apart funds in the State Treasury for the payment of any bonds issued by the State prior to January the first, 1874.

SECTION 1. Be it enacted by the Senate and House of Representatives of the State of Louisiana, in General Assembly convened, That hereafter no officer of

this State shall have power or authority to assess, collect or enforce the payment of any tax for the payment of the principal and interest of the State debt, or for the payment of any bonds heretofore issued by the State, or the interest thereon, the assessment or collection of which is not specially provided for and authorized by an act of the General Assembly, passed since the first day of January, 1874; and no court, judge, justice of the peace, or other tribunal of this State, shall entertain or have jurisdiction of any suit or proceeding to assess, collect or enfore the payment of any such tax; and no such tax shall constitute a lien or privilege on any property in this State, and no officer of this State shall register or record such tax as lien or privilege or otherwise against any property within this State, and any such tax, though assessed and registered, shall not operate as a legal registration, and no lien shall result therefrom, and all penalties for the non-payment, and all interest for delay in payment of such tax, are hereby abrogated and released, and the bonds of the State tax collectors shall not be deemed to cover the collection of any such tax, and the sureties on the bonds of the tax collectors shall not be liable for the sums collected on account of such tax, and the tax collectors are hereby released from any liability to make settlements for such tax, and shall not be entitled to receive commissions for the collections thereof; Provided, that the provisions of this act shall not be construed to apply to or affect the collection of any taxes due to the State for any year prior to the year 1874.

SECTION 2. Be it further enacted, etc., That neither the Governor, Auditor or Treasurer shall have authority, under any law passed prior to the first of January, 1874, to set apart any funds in the treasury for the payment of the principal or interest of any bonds issued prior to the first day of January, 1874; provided, that nothing in this act shall be construed so as to interfere with or prevent the payment of any interest due on or prior to the first January, 1874.

SECTION 3. Be it further enacted, etc., That this act shall take effect from its passage, and no court of this State shall have power or jurisdiction to arrest or impede its operation by mandamus, injunction or otherwise.

Appproved March 14, 1874.

Act No. 11, 1875. Extra Session.

No. 11. AN ACT

Supplemental to Act No. 3, approved January 24, 1874, and to provide for testing at the instance of any taxpayer, in the courts of the State, the legality and validity of any items of State indebtedness, the legality and validity of which may have been or may hereafter be questioned; to prohibit the Board of Liquidation under said Act No. 3 of 1874, from funding the questionable and doubtful obligations of the State, named or designated in this act, until the same shall have been finally declared legal and valid by the Supreme Court of the State of Louisiana, and to provide the necessary means for carrying the provision of this act into effect; to provide additional members of the said Board of Liquidation, and to repeal conflicting laws.

SECTION 1. Be it enacted by the Senate and House of Representatives of the State of Louisiana in General Assembly convened, that the Board of Liquidation constituted by the second section of Act No. 3, approved January 24, 1874, entitled An Act to provide for funding obligations of the State, by exchange for bonds, etc., is hereby prohibited from issuing any bonds in exchange for any outstanding bonds of the State or warrants drawn previous to the passage of said act by the respective Auditors of Public Accounts of the State on the treasury thereof, forming items of State indebtedness, the legality or validity of which may have been, or may hereafter be, questioned, until said bonds or warrants shall, first by final decree of the Supreme Court of the State of Louisiana, have been declared legal and valid obligations against the State of Louisiana, and that the same were issued in strict conformity to law, and not in violation of the Constitution of this State or of the United States, and for a valid consideration. That any person assessed for State Taxes is hereby authrized, in his own name, to institute suit, or to interveno in any suit which may now or hereafter be instituted in a

court of competent jurisdiction in the Parish of Orleans against said Board of Liquidation, to test the legality and validity of any issue of bonds or warrants drawn previous to the passage of said Act No. 3, by the Auditor of Public Accounts on the State Treasury, the legality and validity of which may have been, or may hereafter be, questioned, and to inquire into the consideration for which said bonds or warrants may have been issued, and in his own name to prosecute such suit or suits to a final termination; and until the legality and validity of each and every issue of bonds and warrants, as aforesaid, shall have been finally passed upon and determined by the Supreme Court of the State of Louisiana; and that, in order to facilitate and bring to a speedy determination all matters in controversy, as provided in this act, every suit hereby instituted shall have precedence in all courts over all other cases, and to be fixed by motion of either party; the day of trial to be named in the motion, and all other cases fixed for the day named in the motion fixing such cases for trial to give way thereto; that all costs incurred in any suits under this act, to the extent of one suit carried to a final issue, as to each separate issue of bonds or warrants, the legality, validity or consideration of which are questioned, if the court shall so determine, shall be borne by the State of Louisiana, and which costs, on the approval of the court, shall be warranted for by the Auditor of Public Accounts on the State Treasurer, to be paid out of any funds in the treasury not otherwise appropriated; provided, that any holder or holders of bonds or warrants whose legality, validity or consideration is questioned in any suit or suits brought under the provisions of this act may intervene in said suit or suits, and that the costs of such interventions shall abide the result of the suits in which such interventions shall be filed.

SECTION 2. Be it further enacted, etc., That the following issue of bonds and warrants, so far as the same may be now outstanding, are declared questioned and doubtful as to their legality and validity, and said Board of Liquidation are hereby prohibited from issuing bonds authorized by section one of Act No. 3, of 1874, in exchange therefor, or until the legality, validity and consideration of the same shall have been *tested* under the provisions of this act, and a final decree rendered as to their legality, validity and consideration, to wit:

First.—The following bonds * * * * * * Bonds issued to the Mississippi and Mexican Gulf Ship Canal Company, under Act No. 116, approved March 8, 1869, $480,000 * * * * * *

Approved May 17, 1875.

OFFICE SUPREME COURT U. S.
FILED
MAR 6 1882
JAMES H. McKEN

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1881.

No. 233.

THE NEW YORK GUARANTY AND INDEMNITY COMPANY,
Plaintiff in Error,

vs.

THE BOARD OF LIQUIDATION OF THE STATE OF LOUISIANA.

ARGUMENT

OF

WILLIAM ALLEN BUTLER,
Of Counsel for Plaintiff in Error.

Supreme Court of the United States,

No. 233, OCTOBER TERM, 1881.

THE NEW YORK GUARANTY AND INDEMNITY COMPANY,
Plaintiff in Error,

vs.

THE BOARD OF LIQUIDATION OF THE STATE OF LOUISIANA.

ARGUMENT

(Additional to the Brief on behalf of the Plaintiff in Error) submitted by William Allen Butler.

This cause comes before the court upon a writ of error to the Supreme Court of the State of Louisiana, to review a decision in favor of the defendant and against the plaintiff in error, affirming a judgment of the Fifth District Court for the Parish of Orleans, refusing to decree the validity of certain bonds or obligations of the State of Louisiana, issued in aid of the construction of the Mississippi and Mexican Gulf Ship Canal, and held and owned by the plaintiff in error, of the par value of $250,000.

See Judgment, Record, p. 54.
Judgment of affirmance, Id., p. 59.

I.—The Question Raised by the Record.

The "Federal question" arising in this cause is, whether the statute of Louisiana (Act No. 11 of 1875, Extra Session), under the operation of which the plaintiff in error was denied relief in the Supreme Court of that State, and by which, as there construed, the contract of the State, expressed in the bonds held by the plaintiff in error, was destroyed, is repugnant to section 10 of Article I. of the Constitution of the United States, which prohibits any State from passing a law impairing the obligation of contracts.

The decision of the court below was in favor of the validity of the State statute in question. The record shows that the decision proceeded on the ground of such validity, and that the construction and effect of the statute were the controlling questions in the cause, leading to the adverse judgment now sought to be reviewed. This court has, therefore, full jurisdiction in the case.

Curran v. *State of Arkansas*, 15 How., 304, p. 321.
Murdock v. *City of Memphis*, 20 Wall., 590.
Moore v. *Mississippi*, 21 Wall., 636.
Brown v. *Atwell Adr.*, 92 U. S., 327.
Citizens' Bk. v. *Board of Liquidation*, 98 U. S., 140.
University v. *People*, 99 U. S., 309.
Williams v. *Bruffy*, 102 U. S., 248.

II.—The original Contract between the State of Louisiana and the Plaintiff in Error, Created by the Bonds and the Advances made on the faith thereof.

The plaintiff in error (which will be styled "the New York Company") is a corporation created and existing under the laws of New York, and authorized to make loans and advances of money on the pledge of personal property (*see Jones* vs. *N. Y. Guaranty & Indemnity Co.*, 101 *U. S.*, 622).

In July, 1871, in the due and regular course of its legitimate business, and upon the application of the Treasurer of the Mississippi and Mexican Gulf Ship Canal Company (which will be styled "the Canal Company"), the New York Company loaned and advanced to the Canal Company the sum of $200,000 on the pledge and hypothecation of 250 bonds of the State of Louisiana, of $1,000 each, issued in aid of the work of public improvement of the Canal Company, and particularly described in the *Record, pp.* 2, 3.

A full copy of a "sample" bond is given in the brief of the plaintiff in error (*p.* 5).

The bonds in question purported to have been issued pursuant to Act No. 116 of the Laws of Louisiana of 1869, entitled, "*An Act providing State aid in the construction of the Mississippi "and Mexican Gulf Ship Canal, and for the issue of State bonds "therefor*," approved March 8, 1869.

A copy of the act was printed in full on each of the bonds.

Its preamble recited that the "State of Louisiana is deeply "interested in the early completion of the Mississippi and "Mexican Gulf Ship Canal to connect Lake Borgne with the "Mississippi near the head of the English Turn, both on ac- "count of the development of the resources of the State and "the improved facilities and immense impetus which would "thereby be given to the commerce of New Orleans."

The act then provided, in substance, for the issuing of bonds of the State in specified sums, to be signed by the Governor and countersigned by the Secretary of State, and sealed with the seal of the State, and to be registered in the books of the Treasurer of the State; the basis of such issue to be the certificate of the State Engineer, or any one of the Engineers of the Board of Public Works selected by the Governor of the State, that the work called for by the act had been done in the manner therein prescribed.

See the Act at length, Brief of Plaintiff in Error, p. 6.

The bonds on which the New York Company made its ad-

vances were executed, in all respects, in conformity with the requirements of the act.

The certificate of the Chief Engineer of the Board of Public Works, selected for this purpose by the Governor of Louisiana, that the work had been done as required by the act, for three consecutive miles, had been given April 23, 1869, and a further certificate of completion of the fourth mile, June 16, 1870. The bonds bore date March 1, 1869, as required by the act. They had (with the single exception of Bond No. 1) been duly registered in the office of the State Treasurer, as therein required, and all had been duly registered in the Auditor's Office (*Rec., p.* 36).

See the Official Certificates, Brief, pp. 22, 23.

Pursuant to the act authorizing their issue, each bond contained the following:

"*For the principal and accruing interest on this Bond, the faith* "*and credit of the State of Louisiana are pledged by act of the* "*General Assembly, No.* 116, *approved March* 8, 1869, *and* "*which act is published in full on the reverse hereof.*"

Besides this complete evidence of regularity and validity, the Supreme Court of Louisiana had, before the date of the advances by the New York Company, adjudged that this particular issue of bonds formed a part of the existing and outstanding indebtedness of the State of Louisiana. The interest had been paid on the bonds by the State as it matured, and the auditor had, on behalf of the State, in his report to the Supreme Court, included the principal as a part of the recognized debt of the State, coming within the limit of $25,000,000 fixed by the Constitution of 1870. The Supreme Court, thereupon, in May, 1871, in an adjudication which turned upon the question of the then existing amount of the State debt, by solemn judgment, included in the outstanding and valid debt of the State the very bonds on which the New York Company, subsequently, made the advance of $200,000.

See Statement of Auditor, Rec., pp. 34–36.

State of Louisiana ex rel. Solomon & Simpson vs. *Graham.* 23 Lou. Ann., 402.

It is a part of the political and legislative history of Louisiana, that prior to the last cited decision of its Supreme Court, the question of the propriety and regularity of the issue, by the Executive of the State, of the bonds on which the New York Company made its advances, had also been the subject of investigation by the Legislative branch of the Government.

On February 3, 1870, charges were preferred before the House of Representatives, numbered 1 to 34, against the Governor of the State, of which No. 21 alleged that he "had corruptly issued to the Mississippi and Mexican Gulf "Canal Company bonds to the amount of $354,000, in viola- "tion of law, before the law had been complied with or the "work done."

An investigation was ordered by a special committee, which unanimously reported that, after a full examination of witnesses and proofs, the charges, including No. 21, were without foundation in fact. The report was accepted by the House, and the charges dismissed.

Journal H. R. of La., pp. 153, 154, 310; *Rec. p.* 49, *at foot.*

The above facts show, without dispute that, before the New York Company advanced its money on the faith of the bonds in question, the obligation expressed in the bonds had been declared binding upon the State by the express, deliberate, and separate action of the EXECUTIVE, LEGISLATIVE and JUDICIAL departments of the State government.

No case can exist in which the validity of obligations of the description to which the bonds in question belong, in the hands of a *bona fide* holder, and before they came into his hands, could have been more thoroughly attested.

The New York Company had an absolute right to rely on their integrity and binding force. Repudiation by the State was, indeed, a risk which it took in parting with its money for these State bonds. But the State has never repudiated them.

It is also undisputed that the State of Louisiana received the full benefit, in work on the canal, of the moneys advanced by the New York Company to the Canal Company on the faith of the bonds in question. Gen. Bussey, the Treasurer of the Canal Company, testified positively as follows: "*Q. The plain-*" *tiff made a loan on these bonds for about* $200,000? *A. Yes,* "*sir;* $200,000 *was borrowed on them. Q. What disposition was* "*made of that money? A. Every dollar of it was spent on the* "*construction and the work on the canal; spent for constructing* "*it*" (*Rec., p.* 10).

The contract created between the State of Louisiana and the New York Company, by the undoubted transaction thus concluded, was for the payment of the sum of money expressed in the bonds according to their tenor and effect, and to the performance of this obligation the faith of the State was pledged.

III.—The offer of the State by the Funding Act of 1874, and its Effect.

After the panic and commercial revulsion of 1873, which swept over the entire country and either caused or completed the ruin of many unfinished schemes of public improvement in every quarter of the Union, and compelled individuals, corporations and even States to resort to methods of liquidation, the State of Louisiana determined to fund its outstanding debt, in a new issue of consolidated bonds, at the rate of sixty cents on the dollar of its debt. In the execution of this plan its Legisiature passed an act, approved January 24, 1874 (*No.* 3, *Laws of Louisiana*, 1874, *p.* 39), by which a Board of Liquidation was constituted and an issue of "consolidated bonds of the State of Louisiana," to the amount of $15,000,000, was authorized, the bonds to be exchanged at the rate of sixty cents on the dollar for all "valid, outstanding bonds of the "State."

See the Funding Act, appendix to Brief of Plaintiff in Error, p. 26.

This court has declared that the above act was, in effect, "an offer on the part of the State to issue new bonds for all "her valid bonds outstanding *whenever the holder chose to accept "the terms on which the exchange was to be made.*"

Durkee v. *Board of Liquidation*, 103 U. S., 646 *p.* 647.

The terms upon which the exchange was to be made, as prescribed by the Funding Act, were simply that all the new consolidated bonds should be "exchanged by the Board of Liquidation for ALL valid outstanding bonds of the State * * at the rate of sixty cents in consolidated bonds for one dollar in outstanding bonds."

The question of the validity of any outstanding bond presented for exchange was to be determined by the Board of Liquidation, by a majority vote, with a right of appeal by the aggrieved bondholder, in case of rejection of the bond, to the "proper court."

Funding Act, 1874, *sec.* 3, *Brief*, *p.* 27.

Acceptance by the holders of the bonds of the State of the novation proffered by the Funding Act was manifestly their sole resource, and the only alternative by which to avoid a total loss.

It is beyond controversy or cavil that at the time of the passage of the Funding Act of 1874 the $250,000 bonds of Louisiana held by the New York Company were, in its hands, "valid outstanding bonds" of the State.

Tested by the principles and rules applied by this court in respect to the contracts of municipal corporations (and leaving out of view the element of State sovereignty), there could be no question as to the right of recovery in a court of law. There was no possible defense to the bonds as against a *bona fide* holder.

The New York Company had fulfilled every legal requirement by enquiring and ascertaining that the bonds were issued in the exercise of a power conferred by law, and that

the duly constituted officers of the State had given the certificates required by the law granting the power. This having been done, the repeated adjudications of this court assured it that, in default of payment, its right of recovery would be complete.

Municipal bond cases, cited in brief of Plaintiff in Error, p. 23.

Bonds of the description of those in question have been "placed, by numerous decisions of this court, on the footing "of negotiable paper. They are transferable by delivery, "and, when issued by competent authority, pass into the "hands of a *bona fide* purchaser for value before maturity, "freed from any infirmity in their origin. Whatever fraud "the officers authorized to issue them may have committed in "disposing of them, or however entire may have been the "failure of the consideration promised by the parties receiving them, these circumstances will not affect the title of subsequent *bona fide* purchasers for value before maturity."

Cromwell v. *County of Sac.*, 96 U. S., 51, and see *Opinion of Mr. Justice* FIELD, *p.* 57.
Murray v. *Lander*, 2 Wall., 110.

In *Orleans* v. *Platt*, 99 U. S., 676, the court again said, in reference to municipal bonds:

"The bonds in question have all the properties of commercial paper, and, in the view of the law, they belong to that "category."

And in the later case of *Pompton* v. *Cooper Union*, 101 U. S., 196, the same doctrine is reiterated.

See also *Buchanan* v. *Litchfield*, 102 U. S., 278.
Harter v. *Kernochan*, 103 U. S., 562.
Bonham v. *Needles*, *Id.*, 648.
Walnut v. *Wade*, *Id.*, 683.

In the latest reported case on this subject the court say, that bonds of this description are "precisely in the same "plight as a promissory note payable to order and endorsed

" in blank or to bearer, the title to which passes by mere " delivery."

County of Wilson v. *National Bank*, 103 U. S., 770, *p.* 776.

This court had also said that " When a State becomes a " party to a contract, the same rules of law are applied to her " as to private persons under like circumstances. When she " or her representatives are properly brought into the forum " of litigation, neither she nor they can assert any right or " immunity as incident to her political sovereignty."

Davis v. *Gray*, 16 Wall., *p.* 232.

Accordingly, in the eye of the law and upon the assumption that the contract and the transaction involving its obligation could ever be the subject of a judicial inquiry, the right of the New York Company to enforce the contract obligation of the State was absolute. All that was wanting was a "forum of litigation" in which to implead the State.

In fact, the court below concedes this in saying, that "If " this were an ordinary action for the recovery of the amount " of the bonds," the fact of their due execution and of the " issuing of the certificate of the proper State officer as to the completion of the work to an extent authorizing their issue, would be conclusive in favor of the New York Company as a *bona fide* holder of the bonds. (*Opinion of* EGAN, *J.*, *Rec.*, *p.* 60.)

The New York Company stood, therefore, on the footing of a *bona fide* purchaser of negotiable commercial paper before maturity and for full value, protected by the law as determined by this court, when the offer of the State was made by the Funding Act to issue new bonds in the sum of $150,000 at a reduced rate of interest for the $250,000 of bonds held by the New York Company.

The rule, or rather the principle, of law, which established and declared the rights of the New York Company, as a *bona fide* purchaser, was one of universal application.

The sole obstacle in the way of an effectual assertion of the right thus guaranteed, related to the means of enforcing it.

Such means were wanting, as between the New York Company and the debtor State, unless and until the latter should voluntarily assent to be impleaded in a proper forum of litigation in respect to its liability on the bonds.

Whenever thus impleaded, the question of liability would become one to be dealt with and determined, not according to the sense of obligation of the debtor, but according to the principles of law applicable to the established rights and relations of the debtor and creditor.

The offer of the State in the Funding Act of 1874 tendered a new contract and a vital inducement to its acceptance by the creditor was the assent of the State to a legal determination of the validity of the bonds.

IV.—The Act of 1875 (No. 11, Extra Session) and its Effect as Construed and Applied by the State Court.

At this stage, the Legislature of Louisiana, at an extra session, held in April, 1875, by an act (No. 11), supplemental to the funding Act of 1874, prohibited the Board of Liquidation "from issuing any bonds in exchange for any outstanding "bonds of the State, the legality or validity of which may "have been, or may hereafter be, questioned, until said bonds "* * shall, first by final decree of the Supreme Court "of the State of Louisiana, have been declared legal and valid "obligations against the State of Louisiana, and that the same "were issued in strict conformity to law, and not in violation "of the Constitution of this State or of the United States, and "for a valid consideration."

Section 2 of the same Act of 1875 provided that the following issue of bonds * * so far as the same may be now outstanding, are declared questioned and doubtful as to their legality and validity, and said Board of Liquidation are hereby prohibited from issuing bonds authorized by section

one of Act No. 3, of 1874, in exchange therefor, until the legality, validity and consideration of the same shall have been *tested* under the provisions of this act, and a final decree rendered as to their legality, validity and consideration, to wit:

"*First.*—The following bonds * * * bonds issued to the Mississippi and Mexican Gulf Ship Canal Company, under Act No. 116, approved March 8, 1869, $480,000."

* * * * * * * * *

In the case of *Durkee* v. *Board of Liquidation*, 103 U. S., 646, cited above, this court held that an Act of the State of Louisiana, passed in 1876, declaring void certain bonds issued by the State, in excess of the constitutional limit of $25,000,000 prescribed by the State Constitution of 1870, and forbidding the Board of Liquidation to receive them as valid, did not impair the obligation of any contract with the holders of such bonds, for the reason that "the Legislature undoubtedly had the "right to forbid its own agent to receive these bonds." The court further say: "This law may not have affected their va- "lidity. It certainly could not make them void if they were "valid before, but it could prevent the board from exchanging "them for other bonds. There was no contract with the "holders of these bonds that this should be done, even if they "were valid. To make such a contract there is needed the "acceptance of the proposition of the State by the holder, and "a good consideration. Neither of these existed in this case, "when the Legislature simply withdrew its proposition as to "these bonds."

But in the case at bar, the Legislature, instead of declaring the bonds void, which it is manifest could not have been done upon any defensible ground, dealt with the holders on the assumption of their having already accepted, or being about to accept, the proposition of the State, as contained in the Funding Act of 1874.

The giving up of a part of the debt on the one hand, and the new promise, by a direct obligation of the State to the creditor, on the other hand, would constitute a good consideration; and the sole question on which the completion of the novation de-

pended the validity of the bonds held by the New York company, was referred, in the first instance, by the Funding Act of 1874, to the Board of Liquidation, and, by appeal, to a court of proper jurisdiction. By the act of 1875 (No. 11), this question was to be submitted directly to the Supreme Court of the State.

The Funding Act of 1874 and the supplemental Act of 1875, alike, contemplated a legal proceeding to test the validity of the bonds. And in such a proceeding the State would, in the language of the court, as cited above, be "properly brought "into the forum of litigation," where "the same rules of law are "applied to her as to private persons under like circum-"stances" (16 Wall, *p.* 232).

The Act of 1875 (No. 11, extra session) was therefore in effect an act providing for the ascertainment and determination by law, of the question of the validity of the outstanding bonds of the State of Louisiana, issued within the constitutional limit as to amount, in the hands of holders accepting the proposition of the State to exchange them for the new consolidated bonds in the hands of the Board of Liquidation.

The construction given to the act by the Supreme Court of Louisiana will be accepted by this court, and held to be binding upon it.

Richmond v. *Smith*, 15 Wall., 429.
Leffingwell v. *Warren*, 2 Blk., 599.
Hall v. *Decuir*, 95 U. S., 485, *p.* 500.

As construed by the Supreme Court of Louisiana, the Act of 1875 (No. 11, extra session) is declared to have provided in substance, that notwithstanding the offer made by the Funding Act of 1874, and notwithstanding its acceptance by the creditors of the State, such accepting holders should not, in any suit or proceeding thereby contemplated, and to which the State consented to be or to become a party, have the benefit of the established rules of law and evidence applicable to *bona fide* holders and purchasers for value, before maturity, of negotiable bonds or obligations, but must be held to the kind and degree of proof required from holders of past due paper or parties affected with notice of every latent defect which might exist or be available as between the State and its own officers and subordinate agents.

The requirement of the original Funding Act of 1874, that the validity of the bonds proffered for exchange by creditors accepting the offer of the State, should be passed upon by the Liquidating Board, with a right of appeal by the creditor in case of their rejection, was a proper precaution.

The requirement of the Act of 1875, that as a condition precedent to the exchange, such validity should be determined by the Supreme Court, did not of itself create any obstacle in the way of the exchange of the old bonds for the new bonds. So long as no new rule of law or no abrogation of any existing rule was attempted to be imposed by the debtor, in the exercise of its legislative powers, no just complaint could be made by the creditor, because the creditor must, of course, stand upon his contract right, and be prepared to establish it by due course of law. But the creditor could not lawfully be deprived of that right under the guaranty of the Federal Constitution, without due process of law, nor, under the same guaranty, could any law be passed by the debtor State diminishing that right, by impairing the obligation of the contract. And if the State said in effect to the creditor, by the Act of 1875, as the Supreme Court of the State declare, that as a condition precedent to the proposed exchange, the creditor must, in a court of law, be deprived of the rights secured by law to a *bona fide* purchaser, we submit that, by such an attempted exercise of authority, it usurped a power prohibited by the express provision of the tenth section of Article I. of the Constitution.

Can a State of the Union thus invite its creditors into a "forum of litigation" of its own, to test, in that forum, the question of the validity of its own obligations, in the creditor's hands, as a condition of its partial payment in a fresh promise, and then, on the judicial threshold, impose new rules of law and evidence for the particular litigation, to impair and subvert, and in their application, utterly destroy, the obligation of the existing contract in the creditor's hands, without violating the plain prohibition of the Federal Constitution?

To this question, we submit, there can be but one answer.

A State may neglect to respond to obligations duly contracted, and the unpaid creditor cannot, without its consent, implead it in its courts of law.

A State may, by acts of its Legislature, declare its own obligations void, and the creditor holding them cannot seek relief in its courts.

A State may offer, by act of its Legislature, to liquidate its public debt by the issue of new obligations, and such offer, by itself, would determine nothing as to the validity or invalidity of the claim of any particular creditor.

A State may even, after such offer, prohibit specified creditors from participating in it, thus withdrawing the offer as to the excluded creditors, without reference to the validity or invalidity of their claims. As if, in the present case, the State, by the Funding Act of 1874, or any subsequent act, had limited the offer of funding to the bonds designated by even numbers and had excluded those bearing odd numbers.

But, we submit, a State cannot (under the Federal Constitution) offer a compromise to its creditors in consideration of new promises at reduced sums, and then, after providing and placing in the hands of its agents such new promises to be exchanged on proof by the accepting creditor of the validity of his claim and the surrender of his old debt, impose as a fresh condition that against the facts and the law, such creditor shall relinquish his established rights as a *bona fide* purchaser, and instead thereof stand in the plight of a holder of a negotiable security past due and subject to all equities attaching to such an inferior legal situation.

A State, in short, waiving the attribute of political sovereignty, and submitting to be sued, becomes amenable to the laws of the land, and cannot make a law of its own for its own case and in its own courts.

The plaintiff in error is not prejudiced by any question as to the time of its acceptance of the offer of the State contained in the Funding Act of 1874. That act recognized the outstanding valid bonds and tendered the new obligations in exchange for them. No time was limited for their acceptance, and the offer was never withdrawn. The new condition sought to be imposed by the Act of 1875 struck at the obligation of the original contract, by seeking to destroy the relation created by that contract, at the time of its inception, between the New York Company and the State. The obligation of the maker of commercial negotiable paper in the hands of a *bona fide* holder

for value before maturity, and the corresponding right of such holder to enforce the obligation, depend upon their situation respectively at the time the obligation attaches. Accommodation paper, valueless in the hands of the party to whom it is first delivered, becomes a binding obligation the moment it passes, for value and at a legal rate of interest and as business paper, into the hands of a *bona fide* holder.

Railroad bonds, payable to bearer and complete as to form and execution, but not sold or negotiated, are not property in the hands of the officers of the corporation whose obligations they purport to be, and cannot be made subject to attachment by a creditor of the corporation.

Coddington v. *Gilbert*, 17 N. Y., 489.

But the same bonds, even if stolen by a thief, become, in the hands of a *bona fide* holder for value, valid contract obligations which can be enforced at law.

Taft v. *Chapman*, 50 N. Y., 445.
Seybel v. *National Currency Bank*, 54 N. Y., 288.
Birdsall v. *Russell*, 29 N. Y., 220.
Goodman v. *Simons*, 20 How., 343.
Murray v. *Lardner*, 2 Wall., 110.

Hence, the sole enquiry is, did the Act of 1875 (as construed by the State Court), destroy or impair the obligation of the contract as it existed as between the State and the New York Company?

V.—The obligation of the contract between the plaintiff in error and the State destroyed by the operation of the Act of 1875.

The Supreme Court of Louisiana, in the decision below, held, that the Funding Act of 1874 was "in itself nothing more "than a tender by the State of a new contract to its creditors, "on certain conditions, as to the bonds held by the plaintiff,

" and other proscribed or suspected bonds, a compliance with " which was made a prerequisite to their sharing the benefits " of the Funding Act " (*Opinion, Rec., p.* 60). The court held further, that by the Act of 1875, No. 11, the Board of Liquidation was, as to the plaintiff's bonds, " positively forbidden " to fund, without the previous judicial ascertainment of the " fact that they had been issued in strict conformity to law, and " for a valid consideration." The court then proceeded to interpret this part of the statute as a positive command and requirement of full inquiry into the original legality and consideration of the bonds, wholly irrespective of any question as to the relation in which the plaintiff, as a *bona fide* holder, stood to the State.

Had the court stopped short of this sweeping conclusion and construed the act to mean that the holders of bonds, whose validity was questioned, must, in lieu of satisfying the Board of Liquidation as to their claims, prove them to the satisfaction of the Supreme Court, according to the established rules of law and evidence, so as to entitle them to the decree of the court declaring the bonds legal and valid obligations in their hands against the State of Louisiana, and that the same, as to them, were issued in strict conformity to law and not in violation of the State or Federal Constitution, and for a valid consideration, the proof given by the plaintiff below would have fully satisfied such requirement.

The evidence showed not only good faith and full value paid, so far as the New York Company was concerned, but also that the money went into the work of improvement in aid of which the bonds were issued; that the examination required by the Act of 1869, granting the State aid, was an actual one and not fictitious, and that the certificates required by the act were actually made.

These facts showed that the bonds were issued in strict conformity to law within the rule which supports acts done pursuant to statutory authority where a substantial compliance is all that is required. They showed, also, that the issue of these bonds was not repugnant to any provision of the State or Federal Constitution. But the court expressly expounded the Act of 1875, as imposing upon the plaintiff, notwithstand-

ing and beyond the most explicit proof of all the above facts constituting its rights to complete the proffered privilege of exchange which it sought to avail of, and accept, the duty of establishing affimatively and by a preponderance of proof, that the examination of the work on the part of the State Engineer was of a certain character, not called for by any requirement of the Act of 1869, that the original organization of the Canal Company was valid, that the mortgage of the work to the State was perfected, and other matters pertinent only as between the State and its own officers, or the State and the Mississippi and Mexican Gulf Ship Canal Company.

The evidence given by the plaintiff in error was ample and conclusive to establish its right of recovery under the uniform decisions of this court, and the claim was fully stated and made and the aid of the Federal Constitution invoked. (*Rec., pages* 46, 60, 61, 72–76.) But the court held that the Act of 1875 denied to the plaintiff in error the rights of *bona fide* holders and refused the relief sought by the petition. This was equivalent to a ruling that there was no obligation on the part of the State as debtor, springing from or resting upon the relation created by the pledge of the bonds to the plaintiff in error.

VI.—THIS COURT CAN AFFORD RELIEF TO THE PLAINTIFF IN ERROR BY THE APPLICATION OF PRINCIPLES ALREADY FIRMLY ESTABLISHED BY PRIOR ADJUDICATIONS.

It it settled "that the Constitution of the United States "embraces all contracts, executed or executory, whether be- "tween individuals or between a State and individuals; and "that a State has no more power to impair an obligation "into which she herself has entered, than she can the con- "tracts of individuals."

Fletcher v. *Peck*, 6 Cr., 87.
Green v. *Biddle*, 8 Wh., 1 p. 92.

In *Wolff* v. *New Orleans*, 103 U. S., 358, the court say (*Opinion of Mr. Justice* FIELD, *p.* 367): "The prohibition of "the Constitution against the passage of laws impairing the "obligation of contracts applies to the contracts of the State, "and to those of its agents acting under its authority, as well "as to contracts between individuals. And that obligation is "impaired, in the sense of the Constitution, when the means "by which a contract at the time of its execution could be "enforced, that is, by which the parties could be *obliged* to "perform it, are rendered less efficacious by legislation oper- "ating directly upon those means. * * Without the remedy "the contract may, indeed, in the sense of the law, be said not "to exist."

It is also settled "That the laws which subsist at the time "and place of the making of a contract, and where it is to be "performed, enter into and form a part of it, as if they were "expressly referred to or incorporated in its terms. The "principle embraces alike those which affect its validity, con- "struction, discharge and enforcement."

Von Hoffman v. *City of Quincy*, 4 Wall., 535, p. 552.

In *Green* v. *Biddle* (8 *Wh., p.* 1) certain statutes of Kentucky imposed conditions upon parties claiming lands in that State, under titles derived from the laws of Virginia prior to the separation of Kentucky and its erection into a State. The compact between Virginia and Kentucky secured to the owners of such lands their rights as they existed prior to the separation. The statutes of Kentucky exempted the occupants of such lands from liability for rents and profits, and required the parties entering them to pay for improvements. It was held by this court that these statutes "narrowed" the rights of the owners of the land and "diminished" their interests (*per* STORY, *J.*, 8 Wheat., 13), and that they impaired the obligation of the contract between Virginia and Kentucky by imposing upon the owners *rules of law prejudicial to their existing rights* (*see p.* 84).

This court has also applied a sound distinction between such State statutes as merely affect contract rights by limiting

the time of maintaining actions upon them, regulating priority of liens and the like, and those statutes which strike at the right itself and impair the obligation of the contract by imposing some restriction or condition in diminution or destruction of that right.

Thus in *Jackson* v. *Lamphire*, 3 Pet., 290, and in the more recent case of *Curtis* v. *Whitney*, 13 Wall., 68, the court held that every statute which affected the value of a contract did not necessarily impair its obligation, and that it was one of the contingencies affecting a large class of contracts that they might be affected by legislation demanded by the public good, as was emphatically the case in the last cited decision. But even in these instances the court say: "Cases may occur "where the provisions of a law * * may be so unreason- "able as to amount to a denial of a right, and call for the in- "tervention of the court" (13 Wall., *p.* 72, *and see Von Hoffman* v. *City of Quincy*, 4 Wall., p. 553).

The rule seems to be that in modes of proceeding and of forms to enforce the contract, the Legislature has the control and may enlarge, limit or alter them, provided it does not deny a remedy, or so embarrass it with conditions and restrictions as seriously to impair the value of the right.

Tennessee v. *Sneed*, 96 U. S., 69, *p.* 74.
Penniman's Case, 103 U. S., 714, *p.* 720.

Aside from such obviously distinguishable cases, the prohibition of the Constitution against any impairment of the obligation of contracts by State legislation has been uniformly enforced; and it has always been held applicable to cases in which obligation of the contract was impaired, by statutes imposing abridgment, obstruction, or conditions in respect to the means or remedies for their enforcement.

In *Curran* vs. *State of Arkansas*, 15 How., 304, the court, in declaring unconstitutional a statute of Arkansas, which in effect withdrew certain assets of a dissolved corporation from the reach of legal process in suits by its creditors, say (p. 309): "True, it does not touch the right of action against the bank; "it only withdraws the real property from the reach of legal "process, and thus affects the remedy. But it by no means

" follows, because a law affects only the remedy, that it does " not impair the obligation of the contract. The obligation of " a contract in the sense in which those words are used in the " Constitution, is that duty of performing it which is recognized " and enforced by the laws. And if the law is so changed that " the means of legally enforcing this duty are materially im- " paired, the obligation of the contract no longer remains the " same.

" This has been the doctrine of this court from a very early " period."

In *Planters' Bank* vs. *Sharp*, 6 How., 327, the court say: " One of the tests that a contract has been impaired, is that " its value has by legislation been diminished. It is not by the " Constitution to be impaired at all. This is not a question of " degree or cause, but of encroaching, in any respect, on its " obligation—dispensing with any part of its force."

And more recently:

" The obligation of a contract includes everything within its " obligatory scope. Among these elements nothing is more " important than the means of its enforcement. This is the " breath of its vital existence."

Edwards vs. *Kearzey*, 96 U. S., 595, p. 600.

The attempted withdrawal by a State statute of any pledge or valid power entrusted, as to its execution, to the officers of the State or to municipal bodies created by it, directly operating to interfere with the rights of creditors, or in respect to their enforcement, impairs the obligation of contracts, and is repugnant to the Constitution.

Von Hoffman v. *City of Quincy*, 4 Wall., 553.
Wolff v. *New Orleans*, 103 U. S., 358.
Edwards v. *Kearzey*, 96 U. S., 595.
Louisiana v. *New Orleans*, 102 U. S., 203.

In the light of these decisions, the Louisiana statute, which we impugn, must be condemned as within the express prohibition of the Constitution of the United States.

When the Funding Act of 1874 was passed, the plaintiff in error, as the holder and owner of the State bonds in question, possessed all the rights given by the law, as well in Louisiana as elsewhere, to a *bona fide* holder for value.

The disability of being able to enforce the obligation by action at law, or by legal process, against the property of the obligor in the bonds, was one which did not at all affect the obligation of the contract, or the legal rights of the plaintiff in error, as a creditor.

The plaintiff in error stood in respect to the State of Louisiana precisely as it would have stood in any one of the United States, in respect to a British corporation, the obligations of which it might have purchased for full value, but which, having no existence here, and no property, could not be impleaded in our courts. These facts would not, however, have affected the contract created by the obligation, and a voluntary appearance by the foreign corporation in an American court, in a suit on the obligation, would have subjected it to all the rules of law applicable to contracting parties.

VII.—A Reversal of the Decision of the Supreme Court of Louisiana by this Court will secure to the Plaintiff in Error the enforcement of its Contract Rights.

Up to the time of the passage by the Legislature of Louisiana of the Act of 1875 (No. 11, Extra Session), the whole course of the State in reference to the bonds in question had been, apparently, in aid of the proper enforcement of the rights of the plaintiff in error on its acceptance of the offer of sixty cents on the dollar.

The State had practically consented to be sued by empowering the Board of Liquidation to determine the question of the validity of the outstanding bonds offered for exchange, and by giving a right of appeal to the creditor. The new State bonds in the hands of the Board of Liquidation were provided and set apart by the State for the purposes of the exchange, thus

securing to the creditor, beyond a mere adjudication of his claims, the means of enforcing them, without which the adjudication would be valueless.

Railroad Co. v. *Tennessee*, 101 U. S., 337.
Railroad Co. v. *Alabama*, *id.*, 832.

The power thus given to the Board of Liquidation became a trust which the State, as the donor, could not annul, and which the donee became bound to execute; and the Board of Liquidation, as an inferior body, could be compelled, by writ of *mandamus*, on a proper case shown, to perform the trust by exchanging the bonds.

Von Hoffman v. *City of Quincy*, 4 Wall., 553.
Wolff v. *New Orleans*, 103 U. S., 358.

In view of the conceded good faith of the plaintiff in error in making the advance of $200,000 of the moneys of its stockholders on the faith of the contract contained in the bonds of the State of Louisiana; of its undoubted right of recovery as a *bona fide* purchaser; of the recognition, prior to the making of the advances, by all departments of the Government of Louisiana, of the validity of the bonds; of the engagments of the State by its offer of funding, by its provision and pledge of new bonds to be exchanged for those held by the plaintiff in error; of its consent to abide by a legal determination of the question of the validity of the bonds; and of the final attempt of the debtor State to impose as a new condition a rule of law destructive of the legal right and relation of the plaintiff in error as a *bona fide* purchaser, we are, surely, justified in asking this court to hold, that the provisions of the Act of 1875 amount to the denial and destruction of contract obligations and call for the intervention of the court by their condemnation as unconstitutional and void.

For the above reasons and those urged in the brief submitted for the plaintiff in error, to which this is additional, the judgment of the Supreme Court of Louisiana ought to be reversed, and the cause remanded, with directions to proceed in conformity with law.

WILLIAM ALLEN BUTLER,
Of Counsel for Plaintiff in Error.

SUPREME COURT U.S.
FILED
JAN 29 1882
JAMES H. McKENNEY, Clerk

EVENING POST JOB PRINTING OFFICE, CASE & CO., N 1882

Supreme Court of the United States.

OCTOBER TERM, 1881.

No. 233.

THE NEW YORK GUARANTY AND INDEMNITY COMPANY,
Plaintiff in Error,

vs.

THE BOARD OF LIQUIDATION.

Writ of Error to the Supreme Court of Louisiana.

Supplemental and Amended Brief.

With the consent of the defendant in error, we file this supplemental and amended brief, and we amend the seventh assignment of error, set forth at page 19 of our original brief, so that the same shall read as follows:

ASSIGNMENT OF ERRORS.—THE SUPREME COURT OF LOUISIANA ERRED :

* * * * * * * *

7. In holding that the Act No. 11 of the extra session of the General Assembly of Louisiana, of 1875, authorized the court to receive oral and other testimony, to contradict and destroy the conclusive presumption in favor of plaintiff's bonds as to regularity of issue and validity of consideration, and in affirming the ruling of the Fifth District Court for the Parish of Orleans, whereby plaintiff's objections to all such testimony were overruled, and said testimony admitted, and in considering and giving effect to such testimony, and yet holding that said Act No. 11 of 1875, extra session, did not, and does not, impair the obligation of the contracts between plaintiff as the holder of said bonds in suit, and the State as the maker of said bonds.

The substance of the evidence so admitted and considered against the protest, objection and exception of plaintiff is found in the bill of exceptions, pp. 46, and 47 of the Transcript of Record, and in the testimony, as reported and printed, of Cyrus Bussey, p. 10, *et seq.*; N. B. Merrill, p. 14, *et seq.*; William H. Gillespie, p. 18, *et seq.*; and the Report of Experts, p. 52, *et seq.*, and is relied on in the opinion of the Supreme Court of Louisiana to show that said bonds were issued in an irregular manner and without sufficient consideration.

The evidence so improperly admitted tends in substance to show, and was held by the said Supreme Court of Louisiana to show:

(*a.*) That the cost of the work done by the Mississippi and Mexican Gulf Ship Canal Company, in the first three miles of its canal, was comparatively small and did not exceed $150,000.

(*b.*) That there were places in the first four miles where the width and the depth of the canal so constructed were somewhat less, or in after years became somewhat less than the dimensions specified in the Act 116 of 1869.

(*c.*) That the chief State Engineer of Louisiana, Thompson,

on whose report and certificates the Governor of Louisiana issued and delivered the bonds, made errors in his measurements.

And for this and the other errors heretofore assigned, and for the many other errors apparent on the face of the record, the plaintiff herein prays that the judgment and decree of the Supreme Court of Louisiana in this cause may be reversed and the said court directed to render a proper judgment and decree according to law and justice.

WILLIAM WIRT HOWE,
JOHN H. KENNARD,
WILLIAM ALLEN BUTLER,
Of Counsel for Plaintiff.

OFFICE SUPREME COURT U.S.
FILED
MAR 1 1882
JAMES H. McKENNEY

Supreme Court of the United States.

In the October Term 1881. No. 233.

THE NEW YORK GUARANTY AND INDEMNITY COMPANY, PLAINTIFFS IN ERROR,

versus

THE BOARD OF LIQUIDATION OF THE STATE OF LOUISIANA, DEFENDANTS IN ERROR.

Supplemental Brief for Defendants in Error.

JAMES LINGAN,
Of Counsel for the Board of Liquidation of the State of Louisiana.

The Times-Democrat Print, 58 Camp street, N. O.

Supreme Court of the United States.

In the October Term 1881. No. 233.

THE NEW YORK GUARANTY AND INDEMNITY COMPANY, PLAINTIFFS IN ERROR,

versus

THE BOARD OF LIQUIDATION OF THE STATE OF LOUISIANA, DEFENDANTS IN ERROR.

Supplemental Brief for Defendants in Error.

STATEMENT OF CASE.

By Act No. 116, approved March 8, 1869, the Legislature of Louisiana, on the theory that the State was "deeply interested in the early completion of the Mississippi and Mexican Gulf Ship Canal," for various alleged causes, "authorized and directed" the Governor to issue the bonds of the State to said Mississippi and Mexican Gulf Ship Canal Company, *in aid* of said canal company, *to an amount which shall not exceed* ($600,000) six hundred thousand dollars," under certain conditions therein expressly stipulated.

As was the habit in those days, the bonds were issued with promptness to the extent of $480,000, and eagerly offered to Northern purchasers, but, failing to find a cre-

dulous market, a portion of them only were by this enterprising corporation, hypothicated with the plaintiffs in error herein, for a loan of two hundred thousand dollars in cash.

By the testimony of Gen. Cyrus Bussey, was who treasurer of this canal corporation (R. p. 10) it appears that there were two issues of these bonds, viz: 360 in June 1869, and 120 more in June 1870, making 480 bonds of the denomination of one thousand dollars each.

It also appears (R. p. 56) that 185 of these bonds were funded into consolidated bonds by the Board of Liquidation after the plaintiffs received the bonds sued upon herein and before the passage of Act No. 11 of 1875. viz: Sixty-one bonds were funded August 25, 1874, and one hundred and twenty-four were funded on March 8. 1875. (Vide certificate of Secretary of State, P. G. Deslonde, Record p. 56.)

It appears further, from documents marked "B" and "C," Record pp. 31 32 and 33, that plaintiffs advanced the $200,000, less commissions and interest, on July 29 and August 1, 1871, two years *after* the first, and one year *after* the second issue of bonds, about three and a half years *before the funding* of the 185 bonds above mentioned, and nearly *four years before* the passage of the act No. 11 of 1875, by which their funding was prohibited.

On the 17th of May, 1877, nearly six years after possession, and exactly two years after the Legislature had prohibited defendant from funding these bonds, except upon proof of their legality and consideration, the present suit was instituted as they themselves aver, for the pur-

pose of having their validity tested under act No. 11, 1875.

Plaintiffs, after alleging their corporate capacity and *bona fide* possession for valuable consideration of two hundred and fifty bonds of the above issue, aver that they are "desirous of having them exchanged for the Consolidated Bonds of the State, in accordance with Act No. 3, approved January 4, 1874." They further call the attention of the Court to the fact "that under the provisions of Act No. 11, approved May 17, 1875, the Board of Liquidation (defendants herein) *is prohibited from funding said bonds*, or exchanging them for the Consolidated Bonds of the State," until the said bonds should first be declared by the State Supreme Court legal and valid obligations of the State and issued in strict conformity to law, for valid consideration, and *not* in violation of State or United States Constitution. (See Record, pp. 1 and 2). Plaintiffs then make the *direct issue on the merits*, as follows, viz.: "Now your petitioners represents that *the said* bonds are *legal and valid obligations* against the State, and that the same *were issued in strict conformity to law, and not in violation of the Constitution* of this State or of the United States, and *for a valid consideration.*" Having thus placed themselves entirely *within the statute* of 1875 forbidding the Board of Liquidation to fund or exchange their bonds until the State Supreme Court should have declared them "legal and valid, and issued for consideration, and in strict conformity to law," etc., they pray "that the matter may be duly and legally investigated by the State Court, and that, after due proceedings had *according to law* (*i. e.*, the law of 1875, No. 11, thus in-

dulous market, a portion of them only were by this enterprising corporation, hypothicated with the plaintiffs in error herein, for a loan of two hundred thousand dollars in cash.

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voked) "that said bonds be decreed to have been issued *in strict conformity to law* and not in violation of the Constitution of *this State* or of the United States, and that they be declared *legal and valid* obligations of the State of Louisiana, *and issued for a valid consideration.*" R., p. 2.

Notwithstanding all these pleadings and the specific appeal and prayer to the State Courts to decide upon the legality, validity and consideration of these bonds, the attorneys for plaintiffs, finding their pretensions utterly unsupported by facts, objected to cross-examinations of their witnesses, or the introduction of evidence by the defense, to show the transparent illegality, invalidity and utter want of consideration or conformity to the law, in the issuance of these bonds, *because the defense had failed to plead fraud or error.* (See plaintiffs' bill of exceptions, Rec., p. 46-7). The District Court overruled the objection, and finally decided against them on the merits. It is undisputed that the whole issue of bonds was upon the two certificates of the State Engineer, General Jeff. Thompson, and were for work done upon the four miles beginning at Lake Borgne and running up Bayou Dupre toward the Mississippi River, at the rate of $120,000 per mile. The testimony also establishes that the whole cost of the work done on the first three miles was $4200, and the use of the dredge boat for twenty-one (21) days, at $15 per days, say $315—in all, $4515, for which the Governor issued $360,000 of State bonds. On the fourth mile the work cost from $50,000 to $75,000—it being in a wide lagoon, where the mud was very soft. (Rec., pp. 14-16). One hundred and twenty thousand dollars of bonds was also issued for this fourth mile. On an exam-

ination by a board of experts, appointed by the court five years after this the only work or dredging found on the whole first four miles of which any evidence remained was some piles driven at the mouth of the Bayou Dupre, which showed some dredging had been done between them, and about 100 yards cut through a small neck of land to straighten the bayou. (Rec., pp. 53-4).

No connection between the river and the lake was ever made, and although it is shown that a narrow and shallow channel was made from the bayou to near the river—from the end of the fourth mile to within a few hundred yards of the river—that work has no relation to the $480,000 bonds pretended to have been issued "*to aid*" in the construction of the first, second, third and fourth mile.

There is no pretense, moreover, that the State or public were to be *directly* interested or benefited by the receipts of the canal; and it is shown that the depth of water in the lake—*less than ten feet* (Rec., pp. 16 and 21)—rendered the projected canal worthless as a public work, even if the public, instead of a private corporation, had been the prospective beneficiaries of the work.

On appeal to the State Supreme Court, the same counsel for plaintiffs have the case placed for trial on the preference docket, "*upon suggesting to the court that this suit is brought under Act No. 11 of 1875, extra session;*" and the Supreme Court of the State so held, and decided that the bonds were *not* "legal and valid. and issued for consideration, and in conformity to law;" (Rec., pp. 58 and 59), and hence could not be funded or exchanged for consolidated bonds under Act No. 3 of 1874.

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It was here, for the first time, that plaintiff discovered that Act No. 11 of 1875, extra session, was unconstitutional, null and void.

One would have supposed, if that act was void because in conflict with the tenth section of the first article of the Constitution of the United States, plaintiffs would not have brought their suit under that act, as they assured the State Court that they had done, nor would they have claimed *under that law* that their bonds were legal and valid, etc. It might also have been supposed that they would not, after such pleadings and after having claimed the jurisdiction of the court under that law, have asked to be put out of court by avering the law to be null and void under which they proceeded, and under which the court was alone acting at their solicitation.

This, however, is exactly what the plaintiffs did do in their prayer and petition for rehearing. (Rec., p. 72 et seq). They virtually allege the validity and force of the law, by asking that its provisions be extended to them, and that *under that law* their bonds be declared valid and fundable. Can they do this, and when the State Court finds the facts against them, face about and in their prayer for a rehearing before the State Supreme Court, lay a foundation for a writ of error to this Honorable Court on the ground that the act which they invoked, and under the provisions of which they sought relief and remedy, was null and void because in conflict with the Constitution of the United States? Can the law be valid and constitutional for their relief, and invalid and unconstitutional for their condemnation? But now changing front entirely in their petition for re-

hearing, they allege that "the suit at bar *is instituted under the Act No. 3 of 1874*, commonly called the funding bill. The defendant is created by that act, *and by that act alone is this action authorized.*" Plaintiffs reiterate with great fervor and emphasis, that "*it brought its suit under that act,*" as if to *blot out* their former pleadings and averments, and while the evidence shows that the canal company got $360,000 of State bonds, for work which only cost them $4,200: (Rec. pp. 14 and 15) plaintiff says with touching pathos and plaintive eloquence that, "petitioner is willing to accept the pittance of 60 cents offered by the act No. 3 of 1874, *and to ask for it by the suit provided for in that act;* but when your honors declare that even that pittance shall be refused because the Act No. 11 of 1875, in the opinion of your honors, takes it away, then the Act No. 11 of 1875, takes away the last shred of remedy and right, strikes the *coup de grace* at the contracts of petitioner; and petitioner has a right to invoke, and does invoke the Constitution of the United States, as cited above, *with all the results implied in such pleadings.*" (Rec. p. 72–73.) It is calmly submitted that one of the most prominent and probable "results implied in such pleading" would be the dismissal of the writ of error.

A simple question of fact had been voluntarily and flatly submitted by plaintiff in error to the State Court, involving conclusions of law exclusively pertaining to the construction of State statutes and involving no conflict which would give this court jurisdiction.

The Act No. 11, of 1875, merely provided a *conditional* method of exchanging doubtful bonds for new 'consoli-

dated' bonds. The conditions were—a remission of 40 per cent. in amount, and an examination into the validity and *consideration* of those doubtful bonds, the holders being compelled to *show affirmatively* the validity and consideration. Plaintiffs came into court under this act and assumed to comply with these conditions and obtain new bonds. Failing to establish affirmatively the validity and consideration of their bonds, they attempt, in a petition for rehearing, to attack the law itself.

The only provision in the Funding Act (No. 3 of 1874) warranting any proceeding by a holder of State securities was in the proviso in the third section, viz.: "*Provided*, That the holder of any bond or valid warrant *rejected by a majority of said Board*, may apply by petition to the proper court for relief."

Plaintiffs never appear to have presented their bonds for funding, and the Board never rejected them. Indeed, they aver, *as a reason*, for not so presenting them that "*the Board was prohibited*," etc

The full text of the Funding Bill (Act 3 of 1874), the Act under which these bonds were issued (Act 116 of 1869), and the act prohibiting the funding of certain obligations, including the bonds sued on, except when declared valid by the State Supreme Court (Act No. 11 of 1875), having been printed in the briefs filed by plaintiffs in error, it is not deemed necessary to more than refer to them here.

Article No. 111 (one hundred and eleven) of the State Constitution provides as follows, viz.: "Whenever the General Assembly shall contract a debt exceeding in amount the sum of $100,000, unless in case of war to

repel invasion or suppress insurrection, it shall, in the law creating the debt, provide adequate ways and means for the payment of *the current interest* and of the principal *when the same shall become due.*"

No motion to dismiss has been made in this court, for the reason that the plaintiffs having presented for final determination, *the whole merits*, it has been thought best to accept the issue before your honors, in order that the worthless character of these bonds might be finally and conclusively made known to the world, by this high tribunal, for the protection of misguided capitalists, and the vindication of the State of Louisiana—at lest so far as this issue of bonds is concerned.

PROPOSITIONS.

The important propositions conceived to be involved in the case presented, and which it is desired respectfully to submit, are as follows, viz:

I.

The "Board of Liquidation," being a mere agent of the State, created by law to consolidate the outstanding indebtedness of the State under certain conditions, *after the bonds in controversary had been issued*, while its action cannot affect the validity of plaintiff's antecedent contract, cannot be coerced to violate the law of its creation or to fund bonds declared by the statute and by judicial investigation, to be illegal and invalid. Harrison Durkee et als, vs, Bd. of Liq. of La., U. S. Rep., 103, p. 648.

II.

Plaintiffs in error, having voluntarily sought the jurisdiction of the State Court, and submitted in their pleadings and proof the whole question of validity *vel non*,

in accordance with provisions of Act No. 11 of 1875; they cannot by writ of error when defeated in their pretentions, transfer their claims to this tribunal to avoid condemnation through the provisions of the State law which they have themselves invoked, and to evade the jurisdiction they themselves have selected.

Section 25, Judiciary Act, 1789; Act 1867, section 2; 3 Pet., 446; 21 How., 167; 18 Wall., 249; 10 Otto, 31.

III.

The provisions of Act No. 11 of 1875 are valid.

First—Because they simply stipulate conditions for the *substitution* of a *new contract*, at the option of the creditor. 103 U. S. 648.

Second—Because, it is clearly within legislative power to change the burdeu of proof or other rules affecting the remedy in civil action. Cooley Const. Lim., p. 367, et. seq, and authorities there cited.

IV.

The issue of bonds to the Mexican Gulf Ship Canal Company was in violation of article 111, of the State Constitution inasmuch as the Act 116 of 1869 did not "provide adequate ways and means for the payment of the *current interest* and of the principal *when the same shall become due*," and was therefore void.

V.

The bonds in controversy were issued in violation of the conditions of said act, printed on the bonds themselves, and hence were void on their face, and their issuance *ultra vires*.

VI.

The act of the Legislature (No. 116) authorizing the issue of the bonds under consideration was *ultra vires*, and, therefore, null and void.

VII.

Bonds or other evidences of indebtedness, issued by authority of political or *quasi* political bodies, depend for their validity strictly upon the authority vested in the body authorizing their issue, and on the strict conformity of the issue to the law authorizing the same. The rules of commercial law governing the rights of innocent third holders for value without notice, do not apply to such evidences of public indebtedness. 21 Penn. State Rep., 147-167; 27 Iowa, 28; 60 Maine, 127; 25 Wisconsin, 188; 20 Wallace, 658; Loan Association vs. Topeka; Cooley on Constitutional Limitations, 129, 175, 487.

ARGUMENT.

The undersigned, with the approval of his associates, begs leave to submit the foregoing statement and propositions, and to argue very briefly a few of the points involved.

I., II. AND III.

Tne first, second and third propositions are submitted, on the authorities cited, without argument.

IV.

The Constitution of Louisiana of 1868, in force at the passage of the act 116 of 1869, provided, in Article 111., as follows, viz.: "Whenever the General Assembly shall contract a debt exceeding in amount the sum of $100,000, unless in case of war to repel invasion or suppress insurrection, it shall, *in the law creating the debt*, provide adequate ways and means for the payment of the current interest, and of the principal, when the same shall become due."

At the close of the second section of this Act it is provided, "for the payment of the principal and interest of

the bonds, the faith of the State is unconditionally pledged to the holder!" and the learned counsel for the plaintiffs in error have in their brief (p. 8) put the last clause of that sentence *in italics*, as if that was of itself quite "adequate ways and means," for the payment of the current interest and of the principal of the bonds. Beyond this clause, there is absolutely no provision in the act in accordance with this constitutional requirement.

It is true, section seven provides, that, "*when the deficit in interest to the year 1879*, or the deficit in the annual installment of thirty thousand dollars *from that date to the final redemption of said bonds* shall have reached the sum of $100,000, and *as often thereafter* as the said deficit shall have reached that sum," *then* the auditor is to ascertain what rate of taxation will cover said "deficit in interest or annual installments or both," and notify the sheriffs and tax collectors, etc. This is no absolute provision for the payment of the "current *interest*," and clearly no serious compliance with the Constitution. If the constitutional requirement be given any force at all, beyond the mere 'leather and prunella' of syntax, it certainly means an *absolute prohibition* on the Legislature. *depriving it of the power* to create a debt for over one hundred thousand dollars, without providing *in the same law*" for the payment of principal and interest as it falls due, (i. e. "current interest,") by "*adequate* ways and means."

It can hardly be contended that any "adequate ways and means for this payment are provided by section 3 of this act, by which the canal property is mortgaged to the State, but if it were so contended, than attention is called to the decision of a case "on all fours" with the case at bar by

our State Supreme Court and already referred to on another point. The court there held that the act authorizing the issue of bonds to the "Boeuf and Crocodile Navigation Company" void, for violation of Article 111 of the State Constitution, and say; "The act creating this debt does not provide ways and means for the payment, either of the current interest or of the principal. It does indeed declare, section 3, that all the rights and privileges of the * * * Company are pledged, hypothecated and specially mortgaged to the State, but the object of this is to secure the refunding, by the company to the State" * * of the amount of the bonds so issued. "Obviously therefore, the State undertook to advance and pay in principal and interest * * the holders of these bonds; and in the act creating this debt, no provision whatever is made for the means of paying either the principal or the interest." After showing that this pretended mortgage was no security, the court continues: "But if this security had been sufficient to indemnify the State, what provision is made in the act of adequate ways and means to enable the State to pay one single dollar of its debt to the holders of the bonds? Absolutely none. The Legislature simply ignored article 111 of the Constitution, and violated its positive injunction. * * The act was *ultra vires*, and is void; and the bonds having been issued without authority of law, in violation of the organic law, are absolutely void, and impose no obligation, legal or moral on the State." 30 An. La., p. 42; *supra.*

It would be hardly excusable, before this court, to frame an argument to show that sections 4 and 6, by which this act purports to *require* this embryotic canal

company, that has never been shown to have had any organization or capital stock or voting stockholders, to provide out of its surplus canal revenues, (before the canal existed) for the payment of the interest, and, after ten years, for the bonds themselves, was not "adequate ways and means," to that end.

The violation of this constitutional requirement seems so palpable, and the consequent invalidity of the bonds so patent, that the simple printing of the text is conclusive without argument.

V-

But the bonds in question were not issued in accordance with the requirements of the law and were invalid and void.

The conditions precedent stipulated in act 116, *under which alone* the Governor had authority to issue said bonds, were as follows, viz.: The bonds were to be issued *in aid* of said Canal Company, *to an amount* which *shall not exceed* $600,000; *when* said company, beginning at the mouth of Bayou Dupré, shall have completed the proposed canal for a distance of *one mile*, according to specifications, upon the certificate of the State Engineer to that effect, *to the amount* of $120,000; when said company *shall have completed* the second, third and fourth miles in accordance with specification aforesaid, and on the certificates aforesaid, "*each certificate being given on the completion of each of said miles*, the Governor is hereby authorized to issue to said company, under the provisions of this act, *on the completion of each of the said three miles*, the bonds of the State to the amount of $120,000." Compliance with all these conditions, therefore, should

have preceded the issue of bonds, and, even as to the pretensions of third holders, should have been certified as complied with, on the face of the bonds. It should also have appeared that the requirements of Article 111. of the State Constitution had been complied with. The plaintiffs, it is true, assert in their petition for rehearing (brief p. 17) that "the bonds which are in evidence, *recite that they were issued according to the Act.*" but by reference to the printed bond, (p. 5, plaintiffs brief) it will appear that *not a single one of the conditions stipulated has been recited or certified to* as complied with on the face of the bonds. The only recital on the face of the bonds is that "for the *principal and accruing interest* on this bond, the faith and credit of the State of Louisiana, are pledged by Act of the General Assembly, No. 116, approved March 8, 1869, and which is published in full on the reverse hereof." It has been decided by this court that such a recital means nothing. The plaintiffs *were bound to know* that the only constitutional way to pledge the "faith and credit of the State," for the payment of "the principal and accruing" or *current* interest on any bonds, was by providing "*adequate* ways and means" in the act itself.

Had act 116 contemplated the *unconditional* issue of $600,000 bonds of the State, in payment of a *bona fide* public improvement, would the bonds have been differently worded, except as to the *title* of the bond, *i. e.*, the words "State bond *to aid in the construction* of the Mississippi and Mexican Gulf Ship Canal?" Can any intelligent person read the act printed on the back of the bond without seeing that the bond is *not issued* in compliance with its conditions? And if, as is claimed by these so-

called "innocent third holders," they acted upon the certificates of the State Engineer, will not those very certificates condemn them? The conditions require the State Engineer to certify the *first mile*, and the Governor to issue for the *first mile, separately*, and *thereafter* for the second, third and fourth, "each certificate being given on the *completion of each of said miles.*" And why was this required? The record plainly shows the reason. The title itself plainly indicates that the intention was not absolutely to *construct* the canal with these bonds. but "*to aid*" in its construction to a limited amount. The requirements of the law clearly point to the restriction of the issue of the bonds to the amount necessary "*to aid*" in the construction of each separate mile.

It could not be inferred from the Act, by any one less fruitful of imagination than an "innocent third holder," that a law passed *to aid* each mile would authorize the issue of $120,000 of bonds for the first mile, the whole cost of which was only one thousand dollars. The very first certificate, for the three first miles *in block*, shows the whole work to have been done between the fifth and twentieth of April, or fifteen days work, claiming State "*aid in construction,*" to the amount of $360,000, which, according to the superintendent of the work, could not have cost over $4,500! (Record pp. 14 and 15 et. seq.)

The whole purpose and intention in the issue of bonds for the canal was clearly shown by the Act to be, simply to *insure its completion* with the "substantial lock, at least 300 feet long and 80 feet wide, so as to afford navigation at ordinary stage of water in Lake Borgne, from the Mississippi River into Lake Borgne."

The lock at the junction of the river and canal, at once the most expensive part of the construction and the most important to the public for navigation, was to be constructed last, yet the act limits the issue of bonds on the last mile, to the stipulated aid for *each mile* as completed. Had it been the intention of the law to appropriate $600,000 indiscriminately to the whole work, it would surely have given a larger proportion to the last mile including this expensive lock, than to the first and second miles, the whole cost of both of which, was only about $2,500. The plain wording of the act therefore, was that *no issue was authorized* beyond the *actual aid* required to construct each mile, and hence the requirement that the engineer's certificate and the Governor's issue of bonds, should be given as the act says "*on the completion of each of the said miles,*" was not merely a provision in the interest of the Canal Company, which could be waived by them, *but a provision in the interest of the State,* and an absolute condition precedent, the neglect of which shown on the face of the warrants and certificates, and *to the knowledge of these "innocent third holders,"* as their pleadings show, strikes the bonds with *absolute nullity.* Against such a state of facts, the authorities cited by plaintiff, will not stand. Even the very broad and liberal language of this court in Knox vs. Aspinwall, 21 Howard 544, reaffirmed in Town of Coloma vs. Eaves, 92 U. S., p. 490, which is quoted with so much iteration by plaintiffs, can not be made to cover the enormities of this issue of bonds.

Indeed, in the latter case, four of the bench then sitting —the Hon. Associate Justices Bradley, Miller, Field and Davis—dissented from the positions there taken; his

Honor Justice Bradley concurring only on the ground that there was "*a sufficient recital* in the bond." It is not at all conceded, however, that the facts of this case bring it within the doctrine contended for and decided in the above cases. Lynde vs. The County of Winnebago, *16 Wall., 13.*

Every dealer in municipal bonds, which upon their face refer to the statute under which they were issued, is bound to take notice of the statute *and of all its requirements.* Chief Justice Waite in McClure vs. Township of Oxford, 94 U. S. 432.

VI.

But the act of the Legislature No. 116 was *ultra vires* and void.

The preamble to this act reads as follows, viz.: "Whereas, the State of Louisiana is *deeply interested* in the *early* completion of the Mississippi and Mexican Gulf Ship Canal to connect Lake Borgne with the Mississippi near the head of English Turn, both on account of the development of the resources of the State, and the improved facilities and immense impetus which would thereby be given to the commerce of New Orleans."

The same spirit of public benefaction and patriotism, that inspired the framing of the act for the foundation of the Louisiana Lottery monopoly "to increase the revenues of the State," and the Slaughter House monopoly, "to protect the health of the City of New Orleans," thus takes charge of the public interests and proceeds to farm them out for private advantage and profit. It was characteristic of that Legislature, as it has been of others in different times and places.

In considering the question of authority on the part of the Legislature to enact the statute under consideration, it is conceded that there was no special Constitutional inhibition upon the subject. The proposition is reduced, therefore, to the consideration of two questions, viz.: Was the ship canal to be constructed for public purposes or for private benefit and profit? Second. If it is not strictly for public purposes, has the Legislature any power to pass such an act, and can they levy or collect a tax for the payment of the bonds issued thereunder?

In the consideration of the first question, it may be said that the public could have no benefit till the canal was completed; and that, after it was completed, the revenues were to go to the Canal Company and not to the State.

It is by no means conclusive because the preamble to a statute recites certain supposed facts, that courts are thereby bound by such recitals.

Judge Cooley finds authority for saying that "Where the facts concern the rights of individuals *the Legislature cannot adjudicate upon them.*" Const. Lim., 96; 3 Litt., 478; 7 Hill, 80.

It is, moreover, apparent that the mere declaration in the preamble under consideration that, the "improved facilities to the commerce of New Orleans," and the "development of the resources of the State" by digging a new canal to accommodate a trade already "facilitated" by two canals in operation and but half supported, is not to any serious extent a public purpose or object, but rather a cloak to cover a scheme for building up private fortunes at the expense of the tax-paying citizen. Allen

vs. The Inhabitants of Jay. 60 Maine, 124; Jenkins vs. Anderson, 103 Mass., 74; 24 Wis., 350.

In the last two cases quoted the "aid" was asked to assist educational institutions endowed by private legacies, and it was refused on the ground, that the schools were "not under the control of town officers," and that it was not, therefore, a public purpose for which taxes could be levied on the inhabitants.

If this ship canal, therefore, was merely a public object for private advantage and profit; administered, not by public officers in the interest of the public, but by a private corporation, or by individuals for their own profit, the legislature had no authority to pass the act, or to tax the inhabitants to pay the bonds and interest.

It has long ceased to be admitted doctrine that a legislature has sovereign powers in the matter of taxing the citizen. "The American legislatures only exercise a certain portion of the sovereign power. The sovereignty," continues Judge Cooley, "is in the people, and the legislatures which they have created are only to *discharge a trust* of which they have been made a depositary, but *with well defined restrictions.*" Cooley Con., Lim. p. 87. On this point, says Chief. J. Denio, in People vs. Draper, 15 N. Y. 543, "every positive direction contains an implication against every thing contrary to it, or which would frustrate or disappoint the purpose of that provision." Thus the power and the duty of levying taxes "*for public purposes and the* proper needs of government," contains an implication against levying taxes for private purposes or "*in aid of*" private corporations or individuals.

Speaking of the importance and extent of the power of taxation in the legislature, Judge Cooley, who gives great

latitude to the legislative discretion in the determination of what are public objects says, "it will not necessarily follow because the power is so vast, that everything which may be done under pretense of its exercise, will leave the citizen without redress, *even though there be no conflict with express constitutional inhibitions.*" And again, "taxation having for its only legitimate object the raising of money *for public purposes* and the proper needs of government, the exaction of moneys from the citizens *for other purposes* is not a proper exercise of this power, and must therefore be unauthorized." * * * "An unlimited power to make any and everything lawful which the legislature might see fit to call taxation, would be, when plainly stated an unlimited power to plunder the citizen." Const. Limitations pp. 487 and 488, 51 Penn. St. 9.

But no authority could be more emphatic, and no exposition of the law could be more clearly and vigorously stated, than the law stated in the opinion of this honorable court in the case of the Loan Association vs. Topeka, in 20 Wall., 656.

Says the Hon. Associate Justice who was the organ of the court in that case: "To lay, with one hand, the power of the Government on the property of the citizen, and with the other to bestow it upon favored individuals, to aid private enterprises and build up private fortunes, is none the less a robbery because it is done under the forms of law and is called taxation. This is not legislation. It is a decree under legislative forms!"

"It is a great mistake," says Mr. Justice Marr, of our own Supreme Court, after quoting with high approbation the above decision, "It is a great mistake to suppose that

the State Governments have unlimited power to tax the property of the inhabitants." 30 La. An., p. 39 ; Lord Cecil vs. The Board of Liquidation.

The provisions of the statute under discussion show clearly that it was a scheme gotten up for private speculation, and that a *surplus revenue* of over $30,000 per year was contemplated from this canal immediately upon its completion, since it was from that "surplus revenue" alone from which the State bonds and "current interest" were to be paid. It is clear that the ultimate profit contemplated must have been still greater, and yet not one dollar of this revenue, or a single right or interest of any kind was reserved or stipulated on behalf of the State, its officers, or citizens! More than that. It is in evidence that the *actual cost* of the whole work was not over $75,000—the dredge boats having been previously used by the parties pretending to compose the corporation, and having been ultimately transferred and used by the same company in other works. It is a historical fact—outside of the record—that the dredge boats more than paid the cost of all the outlay on the canal, in the drainage contract with the City of New Orleans undertaken after the abandonment of the canal.

The Legislature, according to the largest latitude, having merely contemplated "*aid in construction*," to an amount *not exceeding* $120,000 per mile, it is palpable that at least, *quoad* the excess of the issue of bonds beyond the actual cost of the work, it was a pure donation.

Says Hon. John F. Dillon, then Chief Justice of Iowa, and now United States Circuit Judge, in the Eight Circuit, in Hanson vs. Vernon, 27 Iowa, p. 46:

" 'Taxes are burdens or charges imposed by the Legislature upon persons or property to raise money, *for public purposes or to accomplish some government end.*' Some of the authorities for this doctrine or definition are cited in a note, but I do not stop in the thread of my argument to quote from them. I add that no authority, nor, as I believe, even dictum, can be found which asserts that there can be legitimate taxation when the money raised does not go into the public treasury, or is not destined for the use of the government or some of the public governmental divisions of the State. In other words, a public governmental use or purpose is involved in, and is essential to, the idea of a tax. 'I conclude,' says Jeremiah Black, Chief Justice, in Sharpless' case. (21 Penn., 167) 'that a law authorizing taxation for any other than public purpose is void.'' Again, he says, 'a tax for a private purpose is mnconstitutional, ihough it pass through the hands of public officers. * * It is the circumstance that taxes are contributions demanded for the use of the government, and not for private uses, that confers upon the power to tax its peculiar character. * * The act in question presents the case of the levy of a tax for a specific, designated purpose. Whether this purpose be public or private, whether the money thus required is in the nature of a tax or is an illegal exaction under the name and guise of a tax, are judicial questions. * * It is not a tax laid for public purposes, because the donee thereof is a mere private corporation, voluntarily organized for pecuniary profit, and whose ultimate business is that of a mere common carrier.' * * (p. 58.) The Court cannot uphold the tax in question without sanction-

ing the following principal, viz: '*That it is competent for the Legislature because of the inicdental advantages which would result to the community from the carrying out of the objects of a voluntary private railway corporation, organized for pecuniary profit to authorize a tax to be levied on the citizen and his property, to be given as a bounty to such private corporation, to be used in aid of its undertaking, without any pecuniary compensation to the tax-payer being contemplated or provided.*' Such a doctrine would unsettle the foundation of private rights. The citizen would no longer own his property in fee simple, but hold it as a tenant at the will of the majority of the local community in which it is situated."

It is submitted, therefore, that the bonds having been clearly issued in aid of an enterprise for private profit and not for public purposes, no tax could be levied or collected for their payment, and that the issue was therefore *ultra vires* and void.

VII.

But it is contended that, inasmuch as no plea of fraud or error was specially filed by defendant, we are estopped from showing that the bonds were issued in violation of law, and without consideration, because they are protected by the recitals on the face of the bonds, and by the rules of commercial law governing negotiable securities in the hands of innocent third parties for value.

It is now proposed to show, that neither a plea of fraud, nor conformity to the rules of commercial law, is requisite to enable defendant to go into the whole quesiton of consideration, object, or conformity to the provis-

ion of the law governing this issue of bonds, in the case here submitted.

As a matter of fact, the plaintiffs themselves did not rely upon the recitals on the bonds, but in accordance with their pleadings and the requirements of Act No. 11 of 1875, *under which they then claimed to proceed*, they offered evidence *aliunde*, to show valid consideration and compliance with the act. Rec. pp. 8 to 21.

The whole issue, viz: Consideration and compliance with law *vel non*, was presented by the pleadings, and the defendant merely refuted and disproved the allegations and proof of the plaintiffs. There was clearly no necessity for a plea of error and fraud to warrant this.

Now it will be observed that the certificates of the State Engineer, one for the three first miles and one for the last mile, *formed no part of the recitals on the bonds*, but were offered in evidence *aliunde*, by the plaintiffs on the trial of the case, with additional written and oral testimony.

The attention of the court is also called to the fact, that there are on the bonds themselves, no recitals that they are issued *in conformity to* or *in accordance with* the provisions of Act 116, of 1869, nor is there any recital that the work had been done according to the stipulations in the act "printed on the reverse hereof."

It is true that the learned and accomplished pleaders who have presented the case of these bondholders, have pleasantly spoken of these certificates of the State Engineer, as if they were part and parcel of the bonds themselves, and were to be taken and understood as part and parcel of the "recitals on the bonds," which facts were so

necessary to bring the present case within the ruling of this court in their favorite authority of *Coloma vs. Eaves.* This, however, of course, must have been merely intended for the purpose of bringing their clients within the protection of your Honor's rulings, and not, of course, to mislead the court on a material question of fact involved in the decision of this case.

Indeed, so far from this being the case, it has been already shown that the failure *of any such recitals* on the face of the bonds, coupled with the fact that the whole act was, *as the bonds did recite*, "printed on the reverse" thereof, was a clear warning to all purchasers to beware—"*caveat emptor*"—that the absolute conditions of the act *had not been complied with.*

The doctrine now considered settled by this court goes no further than to say that, where bonds of States or municipalities contain on their face recitals of facts presumably within their own knowledge, or as to official action, contemplated by the law governing the issue, the State or municipality are estopped from contradicting such recitals.

The decision in Coloma vs. Eaves, on which plaintiffs seem so confidently to rest their case, is in no fair sense parallel with the case at bar. That case expressly went off and was decided on the point that the recitals on the face of the bonds were complete and conclusive, that all conditions precedent had been properly fulfilled, and that the municipal authorities *were bound by their own representations.* 92 U. S., 489-90.

We have heretofore recited at length the *conditions precedent* to the issue of those bonds. We have also

shown—as will fully appear by the printed bond on page 5 of plaintiffs' brief—that there was *no recital of any compliance with any conditions at all*—not even of the engineer having certified to the work—on the bonds, while the act printed on the back thereof *showed all of the conditions!* Will this be called "without notice?"

In the case of Lord Cecil, et. als., vs. the present defendant, in 30 An. Rep. La., at page 39. Mr. Justice Marr very clearly and forcibly says: "The law relating to commercial paper, bills of exchange and promissory notes, by which the innocent holder, for value before maturity, is protected against equities and defenses, which might have been available between the original contracting parties, is not applicable to the holders of State bonds or municipal bonds. Every one who purchases such bonds knows that they purport to have been issued *in virtue of delegated authority;* and that their validity, as obligations of the State, or of the municipal corporation, depends upon the nature and extent of the power granted by law."

In another case, where bonds had been issued by the corporation of Shreveport, the same learned authority says: "The fact that the obligation is in the shape of a negotiable instrument, or that it was acquired in good faith for a valuable consideration, before maturity, *in no manner enlarges the power of the corporation, or gives any additional force or validity* to its unauthorized acts. 29 Ann. Rep. La. 678.

In Ottowa vs. Perkins, 94 U. S., 261, this position is sustained. The plaintiffs in error, municipal corporations having issued the bonds in suit by virtue of a pretended act of the legislature, which was *duly published among the*

printed statutes of the State as a law, and therefore prima facie valid, were not estopped from denying its passage, notwithstanding the holder of the bonds was a *bona fide* purchaser *without* notice. "Every person dealing in them must *at his peril* take notice of the existence and terms of the law which it is claimed conferred the power to issue them, no matter under what circumstances he may obtain them." And again: "Not only the courts, but individuals, are bound to know the law, and cannot be received to plead ignorance of it. The holder of the bonds in question can claim no indulgence on that score, and *can take no advantage from the allegation* that he is a *bona fide* purchaser without notice. He would, it is true, be precluded from doing so on another ground; namely, the *want of any legislative authority * * to issue the bonds in question. Want of such authority is* a *fatal* objection to their validity, *no matter under what circumstances the holder may have obtained them.*" Mr. Justice Bradley in Ottawa vs, Perkins, U. S., 94 p. 269.

In Buchanan vs. Litchfield, 102 U. S. Rep., p. 290, the whole doctrine was reviewed by this honorable court. In that case bonds had been issued by a municipality in excess of constitutional restrictions, but with Legislative authority. The city refused to pay, and offered to show by evidence that in various ways the city had become indebted, and was, at the time of voting for and issuing these bonds, indebted, in a sum *beyond the constitutional limit*, although all the city officials participated in the recitals and the issue. Plaintiff objected to this, and "insisted that it was not admissable against him as a *bona fide* holder of the coupons in suit." Mr. Justice

Harlan said: "The purchaser of the bonds was certainly bound to take notice not only of the constitutional limitation upon municipal indebtedness, but of such facts as the authorized official assessment disclosed concerning the valuation of taxable property within the city for the year 1873. * * * It would seem, if the bonds in question *had contained recitals*, which upon any fair construction amounted to a representation upon the part of the constituted authorities of the city that the requirements of the constitution were met—that is, that the city's indebtedness, increased by the amount of the bonds in question, was within the constitutional limit—*then* the city, under the decisions of the court, might have been *estopped from disputing the truth of such representations* as against a *bona fide* holder of its bonds. *The case might then*, perhaps, have been brought within the rule announced by this court in the Town of Coloma vs. Eaves." The court then restate the rule and add: "So in the more recent case of Orleans vs. Pratt (99 U. S., 676) it was said that 'where *the bonds on their face recite the circumstances which bring them within the power*, the corporation is estopped to deny the truth of the recital.' So in 21 How., 539, and 16 Wall., 452, and in County of Moultrie vs. Savings Bank (92 U. S., 631) the validity of the bonds there in suit was questioned, upon the ground that certain precedent conditions imposed by statute had not been complied with. *The bonds, however, recited their issue to be in conformity to the provisions* of the statute which gave the authority to issue them." So in Marcy vs. Township of Oswego (Id., 637) a similar defense "was overruled in favor of a *bona fide* holder for value,

because of the recital in the bonds that their issue was *by virtue of* and *in accordance with* the statute, and *in pursuance of* and *in accordance with* the vote of three-fifths of the legal voters of the township." 102 U. S., 291–292.

"The bonds issued by the city of Litchfield contain no recital whatever of the circumstances which, under the Constitution of the State, *must have existed* before the city could legally incur the indebtedness for which the bonds were issued. They purport it is true, to be issued under the authority of the Act of April 15, 1873, and in pursuance of the ordinance of the city based upon that statute. * * * The present action cannot be maintained, unless we should hold that the *mere fact* that the bonds *were* issued, without any recitals of the circumstances bringing them within the limits fixed by the Constitution, was, in itself, conclusive proof, in favor of a *bona fide* holder that, the circumstances existed which authorized them to be issued. *We cannot so hold.*" *Ibid.*

It is therefore concluded, that defendant was fully authorized to show want of consideration, and want of compliance with law, both as rebuttal to plaintiffs' affirmative proof outside of the bonds themselves, and by virtue of the rules of law governing public securities.

In conclusion, it is submitted that defendant has shown that the issue of the bonds under consideration was in violation of the Constitution of Louisiana; in violation of the provisions and conditions of the very law which it is pretended authorized their issue; in violation of the trust exercised by the Legislature and beyond legislative power. That they were issued without consideration, to a private corporation, for private profit, and for the illegal

and fraudulent purpose of enriching a private corporation and building up the fortunes of private individuals, at the expense of and by plundering the private citizen; and that the said bonds are fraudulent, null and void.

If this brief has been extended beyond the fair limits of a supplemental brief, the undersigned finds his excuse in the importance of the principles involved. A court or counsel can have no higher duty than to protect the rights of the private citizen against the encroachments of unauthorized taxation, for the enrichment of private interests and corporations, and it has been the object of the undersigned to aid the court in that direction.

Respectfully submitted,

JAMES LINGAN,

Of Counsel for the Board of Liquidation of the State of Louisiana.

SUPREME COURT
FILED
MAY 13 1932

Supreme Court of the United States.

OCTOBER TERM, 1931.

No. 233.

THE NEW YORK GUARANTY AND INDEMNITY COMPANY, PLAINTIFF IN ERROR,

versus

THE BOARD OF LIQUIDATION OF THE STATE OF LOUISIANA.

In Error to the Supreme Court of the State of Louisiana.

GUS A. BREAUX,
JOHN McENERY,
of Counsel for the Defendant in error,
The State of Louisiana.

Clark & Hofeline, Brief Printers, 112 Granular Street.

Supreme Court of the United States.

OCTOBER TERM, 1881.

No. 233.

THE NEW YORK GUARANTY AND INDEMNITY COMPANY, PLAINTIFF IN ERROR,

versus

THE BOARD OF LIQUIDATION OF THE STATE OF LOUISIANA.

In Error to the Supreme Court of the State of Louisiana.

By Act No. 116 of the Legislature of Louisiana, of the Session of 1869, the Governor was authorized to issue the bonds of the State in favor of the "Mississippi and Mexican Gulf Ship Canal," as follows:

"That the Governor of this State is hereby authorized and directed to issue the bonds of this State to the Mississippi and Mexican Gulf Ship Canal Company, in aid of said Canal Company, to an amount which shall not exceed six hundred thousand dollars, under the following conditions," viz:

When the said Mississippi and Mexican Gulf Ship Canal Company, beginning at the mouth of Bayou Dupres, on the shore of Lake Borgne, shall have completed the proposed canal for a distance of one mile to the depth of ten feet at ordinary stage of water, with a

width of seventy feet at the top and forty feet at the bottom either by excavating on a new line or by widening, straightening and deepening the channel of Bayou Dupres, then, upon the certificate of the State Engineer, or of any one of the engineers of the Board of Public Works selected by the Governor of the State, that the said work has been done as above provided, the Governor of this State is hereby authorized and directed to issue the bonds of the State to the amount of one hundred and twenty thousand dollars, according to the provisions of this act. That when the said company shall have completed the second, third and fourth miles of said work to the width and depth of the first mile, so as to form a continuous canal, then, upon the certificate of the engineer, as before provided, that the second, third and fourth miles are so completed, each certificate being given on the completion of each of said miles, the Governor is hereby authorized to issue to said company, under the provisions of this act, on the completion of each of the said three miles, the bonds of the State to the amount of one hundred and twenty thousand dollars. That when the said canal company shall have entirely completed the said canal to the width and depth above specified, with a good and substantial lock, at least three hundred feet long and eighty feet wide, so as to afford navigation at ordinary stage of water in Lake Borgne from the Mississippi River into Lake Borgne, then upon the certificate of the engineer, as above provided, that the work is so far finished, the Governor of this State is hereby authorized and directed to issue the bonds of the State to the amount of one hundred and twenty thou-

sand dollars ($120,000), making the total of six hundred thousand dollars ($600,000).

SEC. 2. *Be it furlher enacted, etc.*, That the bonds of the State issued under the provisions of this act shall be signed by the Governor of the State and countersigned by the Secretary of State, and sealed with the seal of the State, to an amount not to exceed six hundred thousand dollars, payable in thirty years, and bearing interest payable semi-annually, at the rate of seven and three-tenths per cent. per annum. The said bonds shall be registered in the books of the Treasurer of the State; shall be dated on the first day of March, one thousand eight hundred and sixty-nine; shall be made in sums of one thousand dollars; shall be payable to bearer, and shall have interest coupons attached, payable in New Orleans or in the City of New York, at the option of the holder, on the first of March and first of September of each year. which interest coupons shall be signed and stamped by the Treasurer of the State. For the payment of the principal and interest of the bonds, the faith of the State is unconditionally pledged to the holder. When the bonds of the State are issued to the Mississippi and Mexican Gulf Ship Canal Company, in accordance with the conditions set forth in the first section of this act, the said bonds shall be made transferable by the endorsement of the President and the Treasurer of the Board of Directors of said Company."

The act authorizing the issue of bonds in aid of the Mississippi and Mexican Gulf Ship Canal was approved the 8th day of March, 1869.

The work was begun on the 5th of April, 1869.

On the 19th day of April, 1869, the governor made a requisition for an engineer, who, on the 20th, was detailed to make, and made a survey of said canal on same day; and on the 23d day of April, 1869, just eighteen days from the commencement of work, it had progressed so far, according to engineer's certificate, that the company was entitled to $360,000 of State bonds under the act.

There were but two issues of bonds: those for the first three miles indiscriminately, by virtue of engineer's certificate of April 23d, 1869; and the second issue for the fourth mile, under engineer's certificate of June 16, 1870.

The bonds sought to be funded by plaintiff, include No. 1, and Nos. 362 to 395, both inclusive, and No. 430, being 35 bonds judicially admitted by the plaintiff to have been issued with reference to the fourth mile from Lake Borgne.

There is nothing to show for what part of the work the bonds held by the plaintiff, 250 in number, were issued, except that they are of the first.

Passing back of the engineer's certificate, evidence was received to show that the law had not been complied with in the issue of these bonds; and the plaintiff has been careful to offer evidence of the prerequired certificate of the engineer, but has gone further and offered in evidence the report of that officer, and of the board of engineers, to the Legislature to the same effect, and also the Auditor's and Treasurer's report that these bonds were outstanding, and that all but one of them, No. 1, were registered.

"Indeed," says the organ of the Supreme Court, Rec.

p. 62, "plaintiff's counsel, while excepting to the evidence on this subject offered by the defense, have themselves gone behind the engineer's certificate and the action of the other State authorities, not only by cross-examining the witnesses, but by offering on behalf of the plaintiff the testimony of several witnesses, including the engineer himself, to prove affirmatively compliance with the statute, and the character and extent of the work. They cannot under our law object to the evidence being considered."

By Act No. 3, of the Legislative Session of 1874, the State originated its funding scheme, which was supplemented by Act No. 11 of the Extra Session of 1875, in which the Board of Liquidation, created by the first act, is prohibited "from issuing any bonds in exchange for "any outstanding bonds of the State * * *, the "legality or validity of which may have been, or may "hereafter be questioned, until said bonds * * * shall "first by final decree of the Supreme Court of the State "of Louisiana, have been declared legal and valid obli-"gations against the State of Louisiana, and that the "same were issued in strict conformity to law, and not "in violation of the Constitution of this State, or of the "United States, and for a valid consideration."

By the second section of said act, the bonds issued to the Mississippi Gulf Ship Canal Company, under Act No. 116, approved March 8th, 1869, $480,000 are declared questioned and doubtful as to their legality and validity and consideration.

When this act was passed, it was known to the Legislature that these bonds had issued on the certificate of

engineers in seeming compliance with the law providing for their issue: that the bonds had been negotiated, and passed into third hands: and that suspicion attached to them, the State Auditor having preferred against the Governor the charge of having issued this series of bonds before the law had been complied with, the work never having been done as required.

The Court found the facts against plaintiff, and by its judgment denied funding of the bonds in controversy; the Supreme Court of the State, whose final judgment is to be the fiat for funding or not funding, affirmed the action of the lower Court.

Upon the writ of error sued out by plaintiff, your Honors' are asked to review the judgment of the Supreme Court of Louisiana.

ARGUMENT.

I.

The main assignment of error, that which pervades, in a manner, and dominates all others, is that the Court admitted evidence to destroy the presumptions in favor of the holder, arising from the bonds, their recitals, and the certificates on which they were issued.

The plaintiff is not seeking to enforce a contract with the State, predicated on bonds held: on the contrary, it seeks to destroy such contract as its bonds evidence, and to substitute in its stead another and a totally different contract proffered by the State on terms and conditions imposed by its funding scheme of 1874, as modified *quo ad* these bonds by Act No. 11 of 1875.

The mere agency of the Board of Liquidation, in this funding plan; the right of the State to forbid its own agent from funding bonds, and consequently, of fixing terms for funding, because, as to bonds issued prior to said acts, there was no contract to fund, are matters judicially determined in Durkee vs. Board of Liquidation, 103 U. S. Reports, 647.

That the offer of the State to fund must be accepted, if at all, on the terms on which the exchange is offered to be made, is the logical deduction which the Court also found.

Therefore, when the New York Guaranty and Indemnity Company in 1877, by its instant action expressed its willingness to accept the offered funding of its bonds it must be held to have done so, upon the terms and conditions of the Acts of 1874 and 1875, which jointly created the funding plan, and fixed the terms and conditions thereof; and these were:

1. That its bonds were declared questioned and doubtful as to their legality, validity and consideration.

2. That it should, as holder, institute its action to establish judicially their validity, legality and valid consideration;

And finally, that this must be finally passed upon and established by the Supreme Court of the State of Louisiana.

These are made conditions precedent without compliance, wherewith the Board is prohibited from exchanging or funding.

It is a grave error in plaintiff to suppose, as it seems to, that it is only called on to establish that it obtained

its bonds for a consideration; the act requires that the holder shall also show affirmatively that the bond primarily issued for a valid consideration, enuring to the State; when the party came into Court, which it had no right to do except under the funding acts, it entered with the obligation and the voluntary undertaking on its part to establish by competent evidence affirmatively its right to fund.

It is obvious, that the first legal consequence, of the acceptance of these terms, for funding, is to change absolutely the position of parties. Instead of standing simply on its original contract, seeking to enforce its provisions, and therefore entitled to all the presumptions which arise to protect the third *bona fide* holder of commercial paper, plaintiff's first obligation under the acts is to consent that its bonds shall be deemed questioned and doubtful: and its next, is its undertaking to establish, affirmatively, and necessarily by proof as in a case of doubtful contract, the validity, legality and consideration of the contract.

If this undertaking on its part, is held to mean that the engineer's certificate, on which the Governor issued the bonds; and that seeming regularity on the face of the bonds, the existence of all which was well known at the date of passing the Act of 1875, were to conclude the inquiry as to the validity and consideration of the bonds, then, the Legislature, knowing that the certificate had issued; knowing that the bonds had been put forth under colour of law, and negotiated, did a most absurd and useless act, when it directed, as a condition of its offer to fund, a judicial inquiry into the legality and validity of

bonds, when it knew there was no inquiry possible; when it knew the inquiry to be absolutely closed by presumptions and judicial admissions, if the theory of our learned adversaries is the correct one.

While it may be conceded that the claim of plaintiff in this respect would be true, if the purpose of the inquiry were the enforcement of rights accruing under the issue of bonds of 1869, in the hands for a third possessor before maturity, for a consideration, it seems impossible to avoid the con- clusion that in its offer to substitute a funded obligation for the questioned and doubtful bond, the State had the right to, and did offer to do so only on the condition that the holders of these bonds, should submit them to a substantial judicial inquiry, to be concluded, not merely upon presumptions, but to an inquiry into the very substance of the alleged obligations; an inquiry into their vaidity; an inquiry into their legality; an inquiry into the consideration for which they issued; the declaration in the act, that they are questioned and doubtful, being tantamount to an averment of fraud in pleading; thus taking them *pro hac vice* out of the class of cases protected by legal presumptions, under authorities cited; opening the door wide to an inquiry into the true state of facts.

The Court will observe that this proffer of funding is not made to an innocent third holder of the State bonds; whatever may be the relation of the holder to the State upon the original bond, whenever it sought funding it appeared in Court as the original holder of an obligation with notice, by the very terms of the act giving

it a standing in Court, that it is tainted, requiring it to assume all the obligations of establishing its validity and full consideration *ab initio*. How can it be heard to complain that in seeking to avail itself of the benefits of the offer, the company suing is held to submit to the conditions and terms of that offer? and wherein is it in any different position from the original creditor with notice of defect in his obligation?

Under the exceptional facts created by the funding acts, we say, then, that the rules governing commercial bonds have no application, for the purposes of the present case; that the act states the rule which, in accepting the offer, the bond holder, as we have seen, also accepts; and that under it the engineer's certificate and the presumptions which arise are subject to rebuttal by evidence —which was properly admitted.

That our learned adversaries entertained this view of the case at one time, is evidenced, by the offer of the testimony of several witnesses, including that of the President of the company and the engineer to prove affirmatively, compliance with the statute; and as our Court state in the opinion in this case, the company "cannot under our law object to the evidence being considered."

Upon its consideration, upon consideration of the facts, the Court found the invalidity of the bonds; we do not understand that this finding is reviewable by this Honorable Court.

II.

The funding scheme organized by the Statute of 1874.

and the supplemental acts of 1875 and 1876, which has been considered in the Durkee case, was for State purposes, and to regulate the financial polity of the State.

Their construction, therefore, is peculiarly within the cognizance of the State courts. It is immaterial that parties outside of the State should be incidentally affected by such construction, when the Statute is intended only to regulate State matters, and where no act of Congress is involved, as was held in Pike vs. Chicago and A. Railway Company, 4 Otto, 172.

In the case of Lord Cecil, 30 An. 37, the Supreme Court of La. say: "The State can be sued in her own courts only by her permission, and in the manner and for the purposes indicated by her. The supplemental funding act, (No. 11 of 1875) required the parties who resort to an action against her, through the Board of Liquidators, to establish the good consideration, and valid issue in conformity to law, of the bonds offered for funding, and restricted this Court to an ascertainment of these requisites by these bonds. It is that law, therefore, that must be our guide, and not the commercial law, in actions like the present. We have a substantial enquiry to make. The holders of these questioned bonds must show affirmatively that they have all the requisites recited in the act of 1875, as necessary to obtain a decree of this court."

This interpretation is affirmed in the present case; we respectfully submit that it is conclusive upon this Court, under a line of authorities, to which it is unnecessary to refer, says, Mr. Justice Bradley, in the case of Town of Ottowa vs. Perkins, 4 Otto, 267, as it has been so often

laid down as the proper rule, and is in itself so obviously correct.

The construction placed upon the acts by the State tribunal, is a conclusive answer to the contention that the rules of the general commercial law, apply; it settles on the contrary that the statutes must be the guide in the substantial inquiry provided; and that the door of inquiry is opened wide as to all questioned and doubtful bonds.

The effect of the Statutes *quo ad* the funding is to change the general rule of evidence, as a condition of the grant of the offer to fund; a change which, in any event, is clearly within the legislative power of a State.

Now, how can the determination of a simple question of the admission of evidence under a State Statute, in a State Court, where no federal law is or can be concerned, become a federal question which this Honorable Court may review?

It is neither a federal question, nor the incident of a federal question, for the inquiry does not reach the rights of the plaintiff under its original contract.

III.

It is urged that the Act 11, of 1875, as thus construed is null and void, because it impinges upon rights of the plaintiff in error protected by the Constitution of the United States, or that under its original contracts the State had incurred stated obligations, which were rights enuring to plaintiff; and which may be summed up in the general statement, that these consisted in an obliga-

tion to treat as conclusive the presumptions arising in favor of plaintiff from the bonds, their recitals and the certificates on which they were issued.

Thus, to state the question, is to misstate the issue at bar: for it is based upon the premise that the purpose is the enforcement of the obligations of the bond; whereas the very reverse is the case: if the plaintiff herein succeeds, the only possible result is the complete destruction of the obligation it now states to be violated, and the substitution of another, and a new obligation.

The true issue presented is, does the plaintiff seek to fund its bonds, under the funding acts of 1874 and 1875? If yea, is it bound by the terms and conditions of the funding acts as interpreted by the Court?

No ingeunity can so state the issue as to make it anything else; that question we have hitherto discussed.

The funding scheme is an unit: it must be accepted in its entirety, or rejected altogether; parties who wish to avail themselves of it, cannot be permitted to select such parts as suit their purpose and reject other parts.

We submit, therefore, that when plaintiff claims the unconstitutionality of act 11 of 1875, as part of the funding scheme, which is its warrant of appearance, it logically argues itself out of court.

But the fact is that no rights of the holder of any bond as such is assailed by the funding scheme; in the language of the Court in the Durkee Case. 103 U. S. Reports, 647, "It was "an offer on the part of the State "to issue new bonds for all her valid bonds out- "standing whenever the holders chose to accept."

If the holder declines to accept, and stands upon his rights as they existed prior to the funding scheme, then they are untouched by it; if, on the other hand, he accepts, then his rights must be measured by the scheme as judicially expounded: we see no possible escape from the alternative.

It is in vain that counsel urge as they do that act 55 of 1874, which is intended to prevent the assessment and collection of all taxes to pay interest on bonds issued prior to Januury, 1874.

The validity of this act is not involved in the instant controversy, as no one seeks to enforce the payment of interest on bonds issued prior to January 1874.

When that act shall be urged as a bar to the enforcement of rights protected by the eonstitution of the United States, it will be time to urge its unconstitutionality.

We submit, with confidence, however, that if as suggested this is the offending act, it is no reason why act 11 of 1875, which does not assail such rights, should be held violative of such constitutional provisions.

It is grave error to say that the funding acts, as judicially inlerpreted take away any rights of plaintiff herein as thcy stood prior to their passage, for whether they stand or fall, un til the Company seek, of its free consent, to avail itself of the provisions of these acts, it stands upon its rights on the contract of 1869, which would then be untouched, and unassailable herein, as not involved in the controversy: but this would necessarily carry the complainant out of court.

We humbly ask that the judgment of the Supreme Court of Louisiana be affirmed.

GUS A. BREAUX,
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of Counsel for the Defendant in error,
The State of Louisiana.

I.

The funding scheme of Louisiana, under acts No. 3 of 1874, and act 11 of 1875, is only an offer to fund, on terms specified, with the consent of creditors, which must be accepted, if at all, as a whole; the judicial interpretation forming part of said acts.

Durkee vs. Board of Liquidation, 103 U. S. R. 647.

II.

The funding acts were passed for State purposes and to create a financial State polity; their construction is, therefore, peculiarly within the province of its courts; and binding upon the Supreme Court of the United States.

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Funding acts interpreted to mean that the burden of proof is on the holder of questioned bonds, to establish his right to fund: which, under the statute, must be done affirmatively, the ordinary rules of commercial law being inapplicable.

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The holder of bonds, for funding, is not an innocent holder for consideration before maturity: he is *quo ad* the funding, under the acts giving him the right to sue, a first holder with notice that his particular bond is questioned and tainted, and is so considered with his consent.

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V.

In the instant litigation, the Plaintiff having a standing in court only through act 11 of 1875, cannot be heard to question its constitutionality.

VI.

In any event the provisions of this act do not and cannot reach vested rights under the bonds of 1869, as its only purpose is to demand of plaintiff that it shall judicially establish, in accordance with its own terms, the proper basis for a new contract.